EVERYBODY'S LEGAL ADVISER

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Everybody's Legal Adviser

Volume I

The Ownership of Land

including a Description; Ownership by Citizens; Aliens; Corporations; by Purchase; Deed; Descent; Will; Occupancy and Prescription; Public Grant; Abandonment; Legal Process; Attachment and Execution; by Occupants for Life; by Mortgage; Rights of Married Men and Women; Homesteaders

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TO THE

HON. MERLIN E. OLMSTED, M. C.

EIGHTEENTH DISTRICT OF PENNSYLVANIA

WHOSE EMINENCE AS A LAWYER HAS BEEN FITLY

CROWNED BY HIS SUCCESS AS A NATIONAL LEGISLATOR

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EVERYBODY'S LEGAL ADVISER

CHAPTER I

INTRODUCTORY

1. Different governments under which the people live.
2. Public and private laws.
3. Both apply to many acts.
4. But not in an unvarying manner.
5. Threefold division of the law defining private rights and duties.
6. Ignorance of the people respecting them.
7. Why the law is generally obeyed.
8. Consequences of failure to know the law.
9. Purpose of this work.
10. Origin of legal rules.
11. Custom or usage.
12. Judge-made law.
13. Statutes.
14. Interpretation of statutes.

1. Every individual in our country lives under three forms of government—national, state, and local; and his rights and duties as a member of each are defined by constitution, by statute and by common law.

2. Besides the laws defining the legal relations which exist between government and its members are other laws defining the legal relations between the people themselves. These laws are very numerous and in

many respects touch the people more closely than the laws defining their public relations.

3. Many of the acts of individuals are double-sided—are both public and private. Thus, should the cashier of a bank rob it, he would be a debtor to the institution for the money stolen; also a wrong-doer to the public and answerable for his offence. Even if he should become repentant and refund the money stolen, he would be just as liable as before to arrest, trial and condemnation. It is true that the officers of a bank, after such an offence has been committed, are often willing, for the sake of recovering a portion, or all, of the property stolen, to overlook the misdeed and to protect, as far as they can, the criminal from punishment. In truth, they cannot give any legal protection; but they may darken the pathway of the public prosecutor by withholding testimony.

Another illustration may be given. A assaults B, boxing his ears. The wrong-doer is liable to B for the damage, the payment of money, which is the legal balm for the wound—often a poor medicine, but the most effective the law can prescribe. Yet A, however privately he may have acted in assaulting B, has committed a public offence, and no settlement with the injured man can prevent the state, through the public prosecutor, from arresting, trying and convicting him for his misdeed.

The individual, or private remedy, which consists in recovering money for the injury done, is called the civil remedy; the public action or prosecution by

the state, the criminal remedy, and may result in imprisonment, or fine, or both.

4. This double-sidedness of human action from the legal point of view covers a large breadth of human conduct, but is not unvarying. The state may declare a misdeed, for which only a money damage could previously be recovered, to be a public or criminal offence, and punishable in the same manner as other public offences. Thus, not many years since, the buyer of merchandise who misrepresented his wealth for the purpose of obtaining credit was liable only in a private action for the damage or injury caused by his deceit; now, very generally, he can be tried and punished as a criminal. On the other hand, criminal offences are sometimes abolished; punishments especially are lessened. That the consequences of wrongful conduct are seen with ever-increasing clearness to affect the public, as well as one or more particular individuals, and therefore to be deserving of proper legal condemnation, while punishment for many of the older offences are observed to be diminishing in severity, are sure marks of advancing wisdom in administering justice.

5. The private rights and duties of individuals pertain to the acquisition, use, and disposition of property; to the association of individuals in various ways for the same purpose; and to the establishment and maintenance of social and industrial relations. Hence the law defining these rights and duties has a threefold division. The larger division defines the rights and duties of individuals in acquiring, using, and dis-

posing of their property; a second division, of rapid growth and importance, defines the rights of individuals to associate as partners, corporators, and in other ways, to hold, use, and enjoy property; while a third division defines the rights of individuals to form social relations, such as husband and wife, as master and servant, and the like, and then defines their rights and duties with respect to their conduct, their contracts, the acquisition and enjoyment of their wealth. The private rights and duties of individuals, thus outlined, it is our purpose to set forth in the following pages.

6. In executing the law, the officers of the government assume that every man knows it; he cannot, therefore, shield himself by confessing his legal ignorance. Nevertheless the laws are so numerous and conflicting that not all are known, even by the most intelligent men. In truth, only a few of the laws are known generally by the people.

7. Why, then, are not infractions more frequent? The answer is, that the intelligence and good sense of the people lead them to pursue a course of conduct in harmony with the law; so, without actual knowledge, they walk, for the most part, in the straight legal paths.

8. Yet there are many occasions when one's intelligence utterly fails to discover the legal rule. On these, the sure path can be known only by inquiry. For this reason, an actual knowledge of the law is a daily necessity to escape unintentional wrongdoing. The non-possessor who relies on his sense of right

is sure to fall into unhappy and costly errors. For example, a person who receives a check from another is required by law to present it to the bank on which it is drawn, within a specified time, for payment. A receiver who disregards this rule and retains the check for a longer period, as is often done through forgetfulness, assumes the risk of loss; and, should the bank on which the check is drawn fail, he cannot go to the person who gave it to him and ask for another. How long then can he keep it without releasing the drawer? One's sense, however keen, can never answer the question. Only by actual knowledge of the legal rule can the receiver know how long he can safely retain the check and hold the drawer or maker liable. Nothing less than an actual knowledge of the law, therefore, can serve as a sure guide for individuals in their conduct with one another in their business and other relations.

9. In this work, it is our purpose to state all the more important legal rules or principles that apply to persons individually, or to those who are associated with others in the ways recognized by society. It is not our purpose to state every rule; for this would be quite impossible. Besides, the law is a vast body of rules, that, like the sea, are never at complete rest. Courts and legislatures are always changing them; hence no man at any particular moment of time can ever present a complete exposition. But we assume that the intelligent members of society, both men and women, are desirous of knowing what they can, and cannot, do in the numberless relations of

daily life; and the most important and abiding of these rules it will be our purpose to describe.

10. Whence are the legal rules that apply to us derived? First, they may be divided into two kinds or classes; statutes and common law principles. The statutes are enacted by legislative bodies; the common law rules are emanations of judicial tribunals. From what source do the courts obtain them; are they lawmakers as well as administrators of the law?

11. The first and most important source is custom. A farmer once sold a mill owner a large quantity of timber, for which the seller was to be paid a stipulated price per foot. After the timber was cut and delivered at the place appointed, a day was set for measuring it. The farmer was surprised on learning that the buyer proposed to apply a mode of measurement quite unknown in the vicinity, which would lessen the quantity about one-fifth. He declined to accept that mode of measuring, and a lawsuit resulted. Had the parties agreed to a specific mode of measurement, of course they would have been bound thereby; not having done so, the court declared that it must have been their intention to be governed by custom; therefore, the question for the court to ascertain was, what custom prevailed. In time, this was clearly found out and declared, and it thus became a rule of law. Very many of the rules of the common law have their origin in this manner. They rest on custom which, through proper inquiry, is clearly ascertained and declared to be binding on all the persons within a state, where the custom is general;

or within a narrower jurisdiction, where the custom is local.

12. Another source of the common law is the court itself. There are many occasions in which no rule of law exists to apply to a particular set of circumstances. This is especially so with respect to questions growing out of new business relations; the use of the telephone and the telegraph, for example. A few years ago there were several questions of this nature resulting from the use of the bicycle. To some of them, old principles were applied; to others, the courts adopted such rules as the exigency required. In so doing, the courts did not pass beyond their proper function; yet they make laws as truly as legislators in Congress, and, were they not endowed with this right, society would suffer.

13. Besides these two great sources of the common law, we have also mentioned the statutes, some of which modify the rules of the common law; others are an addition to them. Recently, a statute has been adopted in thirty-four states and territories on the law of negotiable instruments. In most regards, this law is founded on the common law, and is in harmony therewith; but, whenever adopted, it supersedes the common law; and henceforth individuals living in those states must look to that, so far as it can serve as a guide, and no longer to the common law that existed before its enactment.

14. Lastly may be mentioned legal decisions that are interpretations of statutes. There are many of these. Some statutes are the cause of constant questioning

and answers. No statute can be written so plainly as to preclude all possibility of dispute. Such, in brief, are the sources of the legal rules that are to be set forth in this work for the benefit of all who wish to know their legal rights and duties.

CHAPTER II

WHAT IS LAND, OR REAL PROPERTY?

1. Difficulty in defining land.
2. The importance of understanding the difference between real and personal property.
3. Real property is land.
4. When ice is land.
5. Things annexed by man.
6. Growing crops. What rule applies between seller and purchaser.
7. The rule that applies to a devisee.
8. When growing trees are personal property.
9. Trees standing on a division line.
10. Things easily removed.
11. Surface and mine below, owned by different persons.
12. Land of a corporation.
13. Church pew.
14. Cemetery lot.
15. When money is real property.
16. Intention, in determining the question of the value of property.
17. Use, in determining the question.
18. Different rules apply to persons in different relations.

1. Property falls into two great divisions, real and

personal; and, while the differences between them on the outer boundaries are clearly seen, as they approach each other these differences lessen until one is in doubt whether a particular thing, for example, a cooking-range in a house, is real or personal property. Nevertheless, as both kinds of property exist, we must seek to show what they are.

2. Why is this knowledge important? A stranger, by the permission of a land-owner, builds a house on his land. There may be some agreement between them concerning it, though not in writing. The land-owner sells the land, and the purchaser, soon after taking possession, enters the house and astonishes the occupant by saying it belongs to him. After stating his agreement with the seller, the buyer replies that he knows nothing about it; that he bought the land which includes everything thereon, that if any wrong has been done, the seller is the guilty party to whom the house-builder must look for redress. Thus, what is meant or included by the terms, real property and personal property, is important to all who are concerned in their sale, management, or ownership.

3. Real property is land extending indefinitely upward and downward. It includes every structure and everything growing thereon naturally. In like manner, all minerals are included, even an aerolite that falls from the heavens.

4. Ice is sometimes included, but not always. Ice on a navigable river, whose bed belongs to the state, belongs to the first appropriator. This may be done by taking the ice, or by clearing off the snow from

the surface, marking the ice, or making any other preparation for harvesting the cooling product. And the same rule applies to ice on public ponds.

Ice on a non-navigable river belongs to the owners of the adjoining land, because they are also the owners of the bed of the stream. The line of division between them, which is presumably the middle of the stream, determines the ownership of the ice that forms on the surface. To a navigable stream, owned privately, and not by the state, the same rule applies as to a stream not navigable.

The same rule, slightly qualified, applies to land-owners along a canal. They, too, can harvest the ice formed on the water running through their land, providing this does not interfere with the public use of the canal. But, when the state has condemned and taken the land used for the canal, it is the absolute owner, and the adjoining proprietors have no more rights in the land, water, or ice than they have in any other public property.

5. A different principle applies to things annexed by man. Many of these, as the result of annexing them, form a part of the land itself; while other things retain their former character and are personal property. In the sale or lease of land, it is often difficult to decide whether the things thus added are transformed into realty and become a part of it, or whether they are still personal property belonging to the person who put them on the land.

6. Questions often arise in conveying land on which crops are growing. Do these pass to the purchaser?

The more general rule is, annual crops planted by the seller pass with the land on which they are growing; crops that are mature, awaiting the reaper, do not thus pass, unless they are mentioned in the deed of conveyance.[1]

Growing annual crops may be the subject of a valid oral sale, and the vendee has an implied license to enter and take them. Should the vendor afterward sell the land itself and say nothing about his prior sale of the crops, the crop-buyer, if the purchaser had come into possession, would lose the right to enter and take his crops. He would not be without a remedy, however, for he could proceed against the vendor, who, through accident or fraud, had deprived him of the right to take his crops away.

7. A different rule applies to a devisee, or person who inherits land by will. He takes the crops with the land, whatever be their state of maturity, unless they are needed to pay the debts of the testator. If they are, then they pass to the executor like other personal property, and are devoted to the payment of the testator's indebtedness.[2]

8. Growing trees may be cut down and thus converted into personal property; or, on the sale of land, may be reserved for the purpose of cutting and removing them. In the latter case, should the owner die before cutting them, the administrator or executor of his estate would take possession of them as a part of his personal property. Again, the owner of land who sells trees growing thereon to another by a proper

[1] Washburn on Real Property, § 11, Vol. I., p. 11 (6th Edition).
[2] Pattison's Appeal, 61 Pa., p. 294.

written conveyance, with the liberty to cut and carry them away, parts with an absolute interest in them, while the land itself remains in the sellor or grantor.

9. What rule applies to a tree standing on or near the boundary line, with roots and branches extending into the land of the adjacent owner? The fruit belongs to the owner of the land whereon the tree grows; and he can reach over and pluck it, if his arms are long enough, without infringing the law of trespass. He can even stand on the fence and do this. But he cannot go on his neighbour's land, without permission, for this purpose. If he did, the law would pronounce him a trespasser. The reader may think that the distinction is very fine between reaching over into another's land and plucking fruit, and going on another's land and plucking it; the law is replete with equally subtle distinctions. If the first rule be true, the reader may ask, what becomes of that greater rule stated in the beginning, that land includes everything above and below? On the other hand, the adjacent owner has a right to lop off the branches and roots of a tree to the dividing line.

The body of a tree that happens to stand on the dividing line is the common property of both; neither can cut it down without the other's consent; nor even cut away the portion on his own land, should the tree thereby be injured.

10. Things easily moved may become real property. This is especially so of things used in connection with real property that are useless after severing them. For example, a key to the door of a house is an essential

part of the door itself, and is, therefore, really like the land whereon the house stands. In like manner, the doors, windows, blinds, and other portions of a house that are readily removable, the mill-stones of a mill—are all parts of the structure to which they belong,, and, on its sale, they pass with the structure itself, because, on the one hand, they are essential thereto; on the other, they would be of no use to the grantor were they retained by him. Other illustrations of the same nature are hop-poles piled in a yard, fence-rails, and loose stones used in wall-building. While the application of this rule to many things is very plain; to others its application is difficult. For example, the animals employed in husbandry—farming utensils, plants, doves in the dove-cote—are still often matters of legal contention on the sale of land.

11. Sometimes a mine or quarry is owned by one person, and the surface by another. When this double ownership of land exists, it is the duty of the mine owner to guard the surface from injury by sinking. To this extent, the subterranean or mining property is subservient to the surface. In other words, where the upper and underground are owned by different individuals, the maxim of the law that applies to each one is, he must not use his own in a way that will injure the other.

12. As land owned by a corporation is real property, in a few cases the shares of the corporation itself are of a like nature. Generally, they are personal property. But, when the land held by a corporation belongs to the stockholders, and the corporation is only a manager,

the shares are real property. This is true also of the shares of a corporation created solely for holding, using, or improving real estate.

13. In some states, a church pew is real property; in others, personal property. Unless one's rights are regulated by statute or positive law, his interest is limited or qualified; a right of occupancy under some restrictions. He has an absolute and exclusive right to the possession and enjoyment of it for the purpose of public worship, and may maintain an action against any invader. Should he assign or lease it, the new occupant would have a right to occupy only during public worship, for that purpose and matters relating thereto. A tramp, therefore, could not, by leasing a pew, acquire the right to convert it into a place of shelter; nor a peanut vendor, a stand for selling his favourite fruit. The annual renter of a pew "has at most only a lease-hold interest for the term."

"The English ecclesiastical law forms the basis of the law regulating the affairs of the Episcopal Church in this country, and is in force, except as modified by statutes and the usages and canons of the church." [1]

All the other religious societies have special laws, usages, and local customs that regulate, to a very considerable extent, the rights and duties of the pewholders.

The trustees of a free church, charging for the sittings, have authority to decide where attendants shall sit, "and may, by force, remove one who persists in sitting in a place other than that assigned to him." [2]

[1] Kerr on Real Property, § 36, p. 34.
[2] Ibid., § 38, p. 35.

The absolute sale of a pew does not give the pew-holder an absolute right to the property, as would the sale of a piece of land. He gains "simply a right to occupy, under certain restrictions, the pew during public worship of the congregation, and, possibly, of sitting therein at meetings of the society held for temporal purposes."

Having no title to the soil beneath the pew nor to the space above, he cannot build a vault in the earth, nor decorate the pew in harmony with his tastes, however artistic or grotesque that may be. Again, the rights of a pewholder of a church that has been destroyed by fire, or abandoned, are gone. So, too, after the sale of the edifice or the ground, he cannot share in the proceeds. Nor can he compel services to be held in the church, or prevent its abandonment; or the rebuilding of another. Lastly, a writer has declared that a congregation which abandons its meeting-house as a place of public worship although it be fit for that purpose, and erects a new one on a different site, is not liable in any way to the proprietor or lease-holder of a pew in the old meeting-house, unless the society acted wantonly, or sought to injure him.[1]

As a society possesses such large rights to sell, remove, rebuild, and the like, its rights to make repairs, however extensive they may be, are paramount to the rights of the pewholders.

14. One who purchases, and has conveyed to him, a lot in a public cemetery does not acquire the fee thereto; only an easement or license to bury therein. So

[1] Kerr on Real Property, § 42, p. 38.

long as he is in the rightful possession of the lot, he may maintain an action against a trespasser, and especially against one who enters and disinters the remains of a person buried there; in some states, this is made a penal offence. The common law recognizes a right of property in a shroud, or apparel of the dead, as belonging to the person who had charge of the funeral. In Indiana, the bodies of the dead belong to the surviving relatives in the order of inheritance, like other property, and the courts possess the power to protect the relatives in the exercise of the rights of burial. In Minnesota, a widow recovered damages for the dissection of the body of her deceased husband. In Pennsylvania, it has been held that a widow's control of the body ceases at burial, and, therefore, the disposition of it belongs to the next of kin. In Rhode Island, the courts have decided that a widow has a right to recover the body of her lamented husband when it has been buried by the next of kin in a particular cemetery against her wishes.

The burial of a dead body in a cemetery lot is the only possession necessary to create a complete ownership of the easement and render it heritable. Again, so long as a gravestone marks a place for burial, the possession is adverse to all other claimants. The paramount right of burial is in the surviving husband or widow.[1]

A person who has erected in a cemetery lot a gravestone or monument, which is defaced or removed during his life-time, may recover damages from the wrong-

[1] See Pettigrew v. Pettigrew, 207 Pa., 313, for other points and references.

doer. And when this is done after his death, the heirs of the person in whose memory the stone was erected can maintain an action against the defacer.

The rightful possessor of a lot may transmit it to his heirs at law. Possession once established, unless voluntarily given up, continue as long as the graves are marked and the cemetery is used for that purpose.

As the right of burial is not an interest in the soil, if the friends of a person buried there are required to remove his bones, because the ground can no longer be used for this purpose, they cannot recover any compensation. Usually, cemeteries are subject to public regulations. The purchaser of a lot acquires no title to the land; simply the exclusive right to bury therein so long as the cemetery is used for that purpose. The right, therefore, "is revocable whenever public necessity requires."

A person's exclusive right to the possession of a spot of ground in a public cemetery in which his dead are buried is limited to the time during which the ground is used for burial purposes, therefore, when the cemetery is discontinued and the bodies are to be removed, notice should be given to the party interested therein, if he is known, and if he fails to remove the remains their removal by others must be done in a decent manner. The right to bring an action to recover damages for unlawfully removing remains from a grave does not rest on such facts as the erecting of a headstone, raising a mound over the grave and the like, but on the right of an easement or license.[1]

[1] Note, 75 Am. St. Rep. 430.

15. Sometimes money, the most fluid of all things, partakes of the character of realty, or of the incidents and attributes of real estate. Money, which by agreement is to be invested in land, equity regards as land; vice versa, land which is to be converted into money, as money.

Again, a man who, in his will, directs that land shall be sold and the money paid over to an alien, may have his wish executed, though the alien could not have taken the real estate.

16. The two most important rules to apply to the question, whenever it arises, whether a thing should be regarded as real or personal property, are intention and use. Intention is inferred from the nature and mode of annexing the thing and the situation of the annexor; his relation to the land, and the policy of the law. A house, for example, built on another's land with his permission, is, between the parties, the builder's personal property;[1] otherwise, it belongs to the owner of the land. Again, a structure erected by a tenant during his tenancy, by virtue of an agreement to remove it before he goes away, is his own personal property, and he has a right to remove the structure at the expiration of his lease.

A, who was a land-owner, agreed with B that he might build a barn on his land. B was to hire the barn and remove it whenever he desired. Afterward, A sold the land to C, they agreeing that the barn should not be included in the sale and conveyance. C sold the land to D, saying nothing, either through forget-

[1] Kerr, § 67, p. 63.

fulness or design, about the barn. D, supposing the barn passed to him by the conveyance, insisted on retaining it; and the court decided that he was the owner, unaffected by the agreement made by former owners. Of course, a different principle would have applied had he known, or believed, that B had built it by virtue of an agreement with A. B, therefore, was deprived of the ownership of his barn, for D was an innocent purchaser. B had a claim against C for its value, but a claim of this kind against another who may be worthless is a poor equivalent for the thing itself.

17. The use to be made of things is often important in determining whether they are real or personal property. Thus, the blinds of a house that have been fitted, and are temporarily off at the time of the sale for the purpose of painting or repairing them, pass with the sale of the house itself, and, for the reason that perhaps they could be used nowhere else. In like manner, a farmer who has a large quantity of cut timber on his land, and especially who has been in the habit of selling it, may remove it within a reasonable time, because no use could be made of a large quantity of timber on the land itself. The quantity, as well as the ordinary practice of the farmer, would be decisive in fixing the nature of the timber. On the other hand, if he was in the habit of cutting timber occasionally for the purpose of converting it into fences or boards for farm use, this would be equally conclusive of his intention concerning a few sticks that might

happen to be lying on the ground at the time of the sale.

Another illustration of the same nature is the existence of a quantity of peat, wood, or other fuel on a farm at the time of its sale. If the quantity is small, the law presumes that it was prepared for use on the land, and it goes to the purchaser; if the quantity is large, the opposite presumption will be applied, and it will be retained by the vendor as personal property.

A curious case may be added; that of a landowner who quarried a large stone, designed for a tomb outside his farm, and sold his land, giving the purchaser notice of his intention. This stone, as the court held, was his personal property, though it remained in that place for more than thirty-five years after selling his farm.

18. It may be noted that, in describing the things that are on the dividing line between real and personal property, we have been looking at those which concern sellers and buyers of land. Between landlords and tenants, mortgagors and mortgagees, and other parties, different rules apply; which will be hereafter given.

CHAPTER III

OWNERSHIP OF LAND

§ 1. In General

1. Land may be owned absolutely.
2. Meaning of entire or absolute ownership.
3. Who can hold it. Aliens.
4. Corporations.
5. Words needful in a deed.
6. What words in a will.
7. When lands given by will are a gift.
8. When gift lands may be taken for donor's debts.
9. An absolute owner's right to sell.

1. The law relating to real property was brought from England, and bears many marks of its feudal origin. Though it has not been modernised like the law concerning personal property, yet many elaborate and technical principles have been swept away, leaving a residue easier to comprehend.

2. By absolute or entire ownership is meant the largest and most complete dominion one can possess in land. Generally, the word estate is used in the law books instead of ownership to indicate one's interest in land. The usual phrase to indicate an absolute

estate, or unlimited, unrestricted ownership, is "fee simple."

No one, in truth, can acquire absolute dominion, because the state, notwithstanding the large freedom enjoyed by everyone, possesses an undoubted right to take land for public purposes; or rather, to use it as the public needs may require. Thus, as we all know, the state is taking lands for roads, buildings, water reservoirs; and, as civilisation expands, other public uses may arise. Vast quantities have been taken for railroad purposes under the right, as it is called, of eminent domain. In other words, a railroad corporation is a public instrument or agency to such an extent that the state permits the taking of such lands as may be needed for the proper and effective execution of its purposes.

Another illustration may be given. Fifty years ago, some of the New England states authorised the manufacturing companies to acquire the right to flow land belonging to individuals for the purpose of acquiring water-power. This authority had its origin in the inability of manufacturing companies to purchase the rights of flowing land on reasonable terms, or, in truth, on any terms whatever. Perhaps it is the largest invasion of the right of absolute ownership of land ever exercised in this country, and the courts, on more than one occasion, have questioned the legality of the proceeding. Yet the absolute, unrestricted ownership of land is unknown in this country or in any other. Nevertheless, in a practical sense, individuals are the absolute owners of a large portion of our

country, acquired, as we shall soon learn, in various ways.

3. Let us begin by inquiring who can acquire or hold real property. Possibly, the reader may think that everybody has this right, yet there are some limitations. There was a time, indeed, when aliens were under various restrictions; and some of the early laws on this subject are curious reading, remembering that those who made them had been in the country only a few days or weeks longer than those to whom they were applied. Long ago, most of the states enacted laws providing that aliens who were, or intended to become citizens, might acquire and hold real property like other persons.

4. Some restrictions are also placed on corporations in purchasing and holding lands. By the common law, a corporation could hold and dispose of real property for any purpose not inconsistent with the object of its creation. By general or special statute, a broader restriction has often been placed on corporations. Generally, their right to acquire and hold real estate is determined by their charters, or by legislative enactment. A national bank, for example, is permitted to hold real estate for its banking-house. It may acquire real estate in the discharge of a debt; but, whenever this happens, it must sell the land at the end of five years by auction, unless it is fortunate in selling sooner by private sale. In other words, a bank is not chartered to deal in real estate, and the law will not permit the association to depart from the real object of its creation. In like manner, a railroad

company, though possessing special rights to acquire land or an interest therein for the purpose of building its tracks, stations, and officers, cannot purchase real estate with the same freedom as an individual. It could not, for example, invest its surplus in real estate as absolute owner, with the view solely to a future profitable sale. Very likely railroads and other corporations transgress to some extent this provision of their charters; their transgressions, however, do not change the law.

Again, though a corporation may transgress its fundamental law in making improper or illegal purchases, a vendor cannot complain and seek to recover the lands he may have sold, should they rise in value, on the ground that the corporation had no right to purchase them. First, because he, too, is a joint sinner in selling to the corporation; second, because if anyone has been wronged, it is the state, which alone has the right to call the corporation to account for its misdeed.

5. In acquiring the absolute ownership of land by a deed or written conveyance, to gain a perfect title it is necessary to use the word "heirs." The title thus acquired is known as a "fee," or "fee simple." It is one of the old terms that has come down to us from the rugged feudal age. This is a very arbitrary rule or principle. "Still," as an eminent author has remarked, "it is as imperative, as a rule of law, now as ever. No synonym will supply its place. Even a grant to 'one and his *heir*' will give him only a life estate, or to one '*or* his heirs'; or to one and 'his heirs

during the life of another,' or to one 'forever,' or to one 'and his assigns forever.'"[1]

Yet the rule is not quite so arbitrary. In an absolute estate given to one by a legislative grant, the word "heirs" is not needful to convey such an estate. An intention to create it, clearly shown by any form of expression, will suffice.

By statutes, also, in many states, it is not necessary to use the word "heirs" to create an absolute estate. Any equivalent words may be used that clearly show the grantor's intention to convey such an estate to the purchaser.

Again, this strict rule does not apply to a grant or conveyance of land to a trustee for the benefit of others. He acquires the needful estate for the proper execution of his trust and no more, without regard to the words used in the deed. Thus, a grant to A and his heirs as a trustee for the life of B conveys an estate to the trustee for B's life only. Again, a grant to A in trust to sell conveys an absolute interest; in other words, A can sell and convey an absolute title to the buyer.

6. In conveying land by a will, a more liberal principle prevails. In these cases, the intention of the testator is regarded and creates the rule. This is enough to convey an absolute interest without the use of the word "heirs." Thus, the use of the words "all," "right," "property," "inheritance," "in fee simple," have proved sufficient to transfer an absolute title in the property devised without using

[1] Washburn, § 52.

the technical words required in a deed of conveyance.

7. Again, one to whom lands are given by will, that are charged with the payment of money, will hold them as an absolute gift; for the testator intended to make him the object of his bounty. Otherwise, the recipient might die after paying the money and lose the whole benefit of the devise .

8. Lands held absolutely, or "in fee simple," are subject to the debts of the owner, as well after his death as during his life. This is a radical departure from the old English law. Says Lord Romilly in his Autobiography: "The heir's right to the real property of his ancestor ought not to be disappointed by the claims of creditors." From this rule, a logical development of the feudal system, the reader can mark the long advance which subordinates the wishes and rights of the heir to the just claims of creditors.[1]

9. One of the most important incidents of a "fee simple," or absolute estate, is the unrestricted right of sale. This right, so long of slow growth, is now as firmly established as any other principle of law. A limited, reasonable restriction on the right of sale or transfer will be upheld, and the purchaser or grantee may forfeit his estate by violating it. Thus, in a devise to A and his heirs, a limitation may be made that, if A in his lifetime fails to convey the land, it shall go to another person, who is named. Such a limitation would be valid. But a condition restricting the right to sell to a single person only would be

[1] See note 1, Williams on Real Property, p. 81 (6th American Edition).

void, as he might happen to be incapable of purchasing.

§ 2. By Aliens; Citizenship

1. Aliens. How classified.
2. On what does citizenship depend.
3. Children born abroad of American parents.
4. Limitation to above rule.
5. Our laws cannot affect persons living under another jurisdiction.
6. Naturalisation is a federal function.
7. Merchant seamen.
8. Soldiers.
9. Who cannot be naturalised.
10. Females are included.
11. First step: Declaration of one's intention.
12. Declaration of minor.
13. Effect of declaration.
14. Length of residence required.
15. Meaning of continued residence.
16. Where application should be made for admission; Requirements.
17. Applicant's moral character.
18. Foreign title must be renounced.
19. Rights acquired by widow and children of applicant.
20. Private citizen can take no action to set aside an order of admission to citizenship.
21. Federal government can act.
22. Effect of naturalisation on children.

23. Effect of marriage by foreign woman to American citizen.
24. Husband need not have been an American at time of marriage.
25. Effect of marriage by an American woman to an alien.
26. Effect of alien husband's death on citizenship of an American wife.
27. Effect of her divorce from him.
28. Naturalisation by treaty.
29. Disabilities of alien land ownership.

1. An alien is one born out of the United States, who has not been naturalised under the Constitution. Aliens may be classified as residents and non-residents, alien friends and alien enemies. Foreigners by birth are presumed to be aliens. By the Federal Constitution and laws alien friends are entitled to the same protection of their rights as citizens. Thus he may maintain an action to recover possession of his land, or to have it divided, or to enforce the sale of land on which he holds a mortgage debt.

An alien friend may legally make a contract with a subject of this country, either here or abroad, and during peace may maintain an action thereon. In times of peace he has practically the same privileges as a citizen in respect to personal property and the obligations arising from contracts. An alien may acquire and hold all beneficial estate in personal, but not in real property. His right to acquire and hold real property is regulated by statute. In

some of the states he may acquire and transfer it; in other states these privileges are withheld from him.

2. Every nation determines for itself who shall, and who shall not, be its citizens. By the laws of some states, citizenship by birth depends upon the place of birth; by the laws of others, citizenship depends upon the nationality of the parents. The latter is called the law of nations because it is the rule in many of them. In the United States both rules exist, but more generally the former. By numerous decisions the law is clearly established that the children born to foreigners in the United States, are citizens of the United States.[1]

3. Citizenship is also conferred on children born in foreign countries whose fathers were at the time of their birth, citizens of the United States. The federal statute provides that "all children born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their brith citizens thereof, are declared to be citizens of the United States."[2] But if a child is born after his father has in any way expatriated himself, he is to all intents and purposes an alien and not entitled to the protection of the United States.

4. If the father was born abroad and has always resided there his child is not a citizen, for the statute says that the rights of citizenship shall not descend to children whose fathers never resided in the United

[1] Re Look Tin Sing, 10 Sawyer, 353.
[2] U. S. Comp., 1901, § 1993.

States.[1] "This limitation," says Van Dyne, "of the privileges of citizenship to the children of citizens who have resided in the United States was designed to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties."[2]

5. Again, while our government may confer the rights and privileges of its citizenship on persons born of American parents in other countries, "it cannot extend its jurisdiction beyond its own territorial limits so as to relieve those born under the subject to another jurisdiction from their obligations or duties thereto; nor can it, by undertaking to confer its citizenship upon persons who have never come within its territory, interfere with the just right of the foreign government to control its own subjects."[3]

6. In the United States by the Constitution, the naturalisation of foreigners is a purely federal function. This has been defined to be the act of adopting a foreigner and clothing him with the privileges of a citizen. And the effect of naturalising one is not affected in any way by the laws of the applicant's country. It is immaterial whether he had, or had not, permission to emigrate from the country of his origin.

7. Merchant seamen also are favoured. Every seaman, though a foreigner, who declares his intention of becoming an American citizen in any competent court who shall have served three years on board of a merchant vessel of the United States subsequent to the

[1] Ibid.
[2] Citizenship of United States, p. 34.
[3] Secretary Fish to President, Van Dyne, p. 35.

date of such declaration, may, on his application to such tribunal and the production of his certificate of discharge and good conduct during that time and also the certificate of his declaration of intention to become a citizen, be thus admitted.[1] This provision was applied thirty years ago to a native of France who had declared his intention to become a citizen of the United States, and who subsequently served as seaman and steward on American merchant vessels for more than twenty years. He claimed the protection of the United States from arbitrary arrest and imprisonment by the Spanish authority of Cuba, and it was promptly regarded. The Department of State interfered in his behalf and ultimately he received $5,000 as a recompense for the wrong thus inflicted on him.

8. Any alien of the age of twenty-one or older who has enlisted and been honourably discharged from the United States Army, may be admitted to citizenship without any previous declaration of his intention. A somewhat different rule applies to those who have served in the navy or marine corps. They must have served for four years.

9. Not all aliens can be naturalised. The first exceptions are the citizens or subjects of a "country, state, or sovereignty" with which the United States are at war. A Spaniard, for example, could not have been naturalised during the war with Spain. "The courts have," says Van Dyne, "at different times, held that neither Chinese, Japanese, Hawaiians, Burmese, nor Indians can be naturalised."[2]

[1] U. S. Comp., § 2174. [2] Van Dyne, p. 57.

10. Naturalisation laws include females as well as males. And an alien wife may be naturalised without the consent of her husband.

11. The first step in the process is to declare one's intention. The applicant must declare on oath, before "a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common law jurisdiction and a seal and clerk, two years at least, prior to his admission, that it is his bona fide intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty."[1] This declaration can be made immediately after his arrival in this country. Having declared his intention, he is then entitled to a certificate, containing a copy of his declaration, duly attested by the clerk and seal of the court.

Besides the specific courts above mentioned, others are included having common law jurisdiction. The term is broad enough to include city, police, and country courts which preserve their records and have a recording officer who acts as clerk.

12. A different rule applies to a minor. If he has lived here three years "preceding his arriving" at the age of twenty-one, he may then "make application to be admitted a citizen,"[2] without having made a declaration of his intention, and two years afterward he may be admitted.

13. This declaration of intention has no effect either in the way of naturalising or expatriating the appli-

[1] U. S. Comp., 1901, § 2165. [2] Stat., § 2167.

cant. He simply records his intention to renounce his present allegiance on becoming a citizen of the United States. He still remains an alien until his naturalisation is completed. "The law, justly regarding a change in his allegiance by a foreigner as an act of grave importance, wisely provides that there shall be two steps in the process. By the first, the purpose of change is announced. Between this and actual naturalisation the lapse of a considerable interval is required in order that the final step may be taken with due deliberation." [1]

"Can the declaration of intention," inquires Van Dyne, "confer any right of citizenship? While the laws of several of the states of the Union extend the right of suffrage to aliens who have declared their intention to become citizens of the United States, a state cannot make the subject of a foreign government a citizen of the United States, or confer on him the rights and privileges appertaining to such citizenship." [2] As the Circuit Court of Appeals has said: "A state may confer on foreign citizens or subjects all the rights and privileges it has the power to bestow, but when it has done all this, it has not naturalised them. They are foreign citizens or subjects still, within the meaning of the Constitution of the United States." [3] Consequently if he goes back to his native country he returns as one of its citizens or subjects.

An illustration may be added in the way of showing an application of this principle. A Turk who had

[1] Secretary Fish, quoted by Van Dyne, p. 67.
[2] Ibid., p. 67.
[3] Minneapolis v. Reum, 6 C. C. A., 31.

declared his intention contemplated a visit to his native land, and inquired of the Secretary of State if he could count on the intervention of the United States in his behalf. Mr. Bayard replied that so far as his political rights were concerned a mere declaration of intention to become an American citizen would give him "no title to claim the intervention of the United States."

Just before the Cuban insurrection of 1869 many Cubans declared their intention to become citizens of the United States, and afterward returned to Cuba. The United States consul at Trinidad interfered in behalf of some of them and asked the Department of State to approve his action. But the Secretary could not. In his reply he said: "It has been repeatedly decided by this department that the declaration of intention to become a citizen does not, in the absence of treaty stipulation, so clothe the individual with the nationality of this country as to enable him to return to his native land without being necessarily subject to all the laws thereof. In the present unhappy state of things in Cuba the Secretary of State can see no reason for departing from so well established and so wise a rule." Mr. Van Dyne adds that in a few instances the Department of State has held that the declarant acquires, by his declaration of intention, a quasi right to the protection of this government while in a third country.

14. Before an alien can acquire citizenship here it must appear to the satisafction of the court admitting such alien that he has resided within the United

States five years at least. The reason for this requirement is obvious. During this period he can learn more perfectly whether he wishes to transfer his allegiance. "Persons," says Secretary Fish, "who may have declared their intention to become citizens often change their mind and fail to carry that intention into effect." Besides, he must reside here continuously. "No alien," so the statute declares, "shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission, resided within the United States." [1]

15. What is meant by continued residence? Van Dyne, after remarking that the word residence means a person's habitual physical presence in a country or place, thus continues: "In its broad sense it means a place of abode, selected with the intention of remaining permanently or for an indefinite period. Taken in its broader sense, temporary absence from the United States, upon business or pleasure, might not be incompatible with continued residence here. The sole criterion would be the intention of the party. To determine this it would be proper to take into consideration the length of absence, its purpose and the circumstances surrounding the case." [2]

In 1868 this question arose in a case under the treaty between the United States and the North German Confederation. The Attorney-General asserted that the residence of an applicant for naturalisation would not be interrupted by a transient absence for business, pleasure or other occasion, with the intention of re-

[1] U. S. Comp., 1901, § 2170.
[2] Van Dyne, p. 83.

turning. On the other hand, to return to one's original country and engage in business would negative such intention. Therefore, as Van Dyne says: "a temporary absence from the United States should not defeat the intention to become an American citizen," but he adds, "a study of the history of our naturalisation legislation does not clearly show this to have been the intention of Congress."

It appears, therefore, that absence for any length of time raises the question. "If the applicant," says Senator Berrien in one of the debates on the subject, "is absent any part of the time, it remains for the court to decide whether that absence is sufficient to prevent the issuing of the certificate." Van Dyne thus sums up the law: "If the facts and circumstances of the absence, as shown in the particular case, indicate no change of intention on the part of the applicant, it is the duty of the court to issue the certificate, without requiring such time to be made up. If there is evidence showing abandonment of intention, the applicant should be refused, and the party should be required to begin *de novo*."

16. The application for admission to citizenship should be made before the clerk of the court to which the preliminary declaration may be made. He must declare on oath that he will support the Constitution of the United States, and that he absolutely renounces all allegiance to every foreign prince or power. To support the Constitution clearly implies that he must have some knowledge of and regard for it. Therefore if he is without a proper understanding of it, his oath

should not be accepted. Van Dyne states two cases not in complete harmony on this important matter. In the first, it was declared that "one who cannot read or write English but has read the Constitution in a foreign language, and knows that the United States has a president, but cannot mention his name, does not understand the principles of the government of the United States or its institutions sufficiently to become a citizen." [1] In the other case "an alien who was ignorant and unable to read and write, and who could not explain the principles of the Constitution, was entitled to be naturalised, where it was shown that he was peaceable, industrious, of a good moral character and law-abiding." [2]

The statute also provides that it shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the state or territory where such court is at the time held, one year at least; and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence.[3]

Courts therefore require the testimony, under oath, of at least two citizens of good standing that of their own knowledge the applicant has been a resident of the United States five years at least, and of the state

[1] Re Kanaka Nian, 6, Utah, 259.
[2] Re Rodriquez, 81 Fed., 337.
[3] Stat., § 2165.

or territory wherein his application is made, one year.

17. What must he possess in the way of a moral character? He must not have been guilty of murder, robbery, theft, bribery, or perjury. Habitual gaming or selling of liquors, where forbidden by the statute of the state wherein the applicant lives, would be a bar to his admission. An anarchist also is excluded.[1]

18. The statute also provides that "in case the alien applying to be admitted to citizenship has borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court."[2]

19. When any alien who has made a declaration of his intention to become a citizen "dies before he is actually naturalised, the widow and the children of such an alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law."[3] It need hardly be added that the declaration of intention and death of the declarant do not confer citizenship on the widow and minor children. They must also take the oaths required in other cases for admission to citizenship.

20. A private individual has no standing in court to institute a proceeding to set aside an order admitting an alien to citizenship.[4]

[1] See cases cited in Van Dyne, § 31, p. 92.
[2] Stat., § 2165.
[3] Stat., § 2168.
[4] Re McCarren, 8 N. Y. Misc., 482.

21. But if a decree of naturalisation has been obtained in a fraudulent manner in a state court, the United States can seek to have it cancelled by a federal tribunal. But the United States denies the right of a foreign government to impeach a certificate of naturalisation issued by an American court.

22. The statute also provides that the children of persons who have been duly naturalised under any law of the United States, or who, previous to the passing of any law on that subject by the Government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalisation of their parents, shall, if dwelling in the United States, be considered as citizens thereof and the children of persons who now are, or have been, citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof." [1]

But the naturalisation of a parent does not confer citizenship on his minor children born abroad before that event and who continue to reside and attain their majority abroad.

A emigrated to the United States from Germany in 1869 and was naturalised here in 1884. The next year he sent for his son, who was seventeen years old, to join him. The son was arrested just before starting and afterward discharged. A sought the intervention of our government, but the Secretary of State replied, that as the son did not emigrate with his father to

[1] Stat., § 2172.

America and therefore was not here at the time of the father's naturalisation, "and has not at any time since been a resident of the United States, he cannot be considered a United States citizen. Our laws require that the children of persons who have been naturalised here must be dwelling in the United States to be considered citizens thereof." [1]

23. By statute "any woman who is now, or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalised, shall be deemed a citizen." [2] This language is broad enough to include any white woman or woman of African nativity or descent, or Indian woman.

24. The question has been raised, must the husband be a citizen at the time of the marriage, or will his subsequent naturalisation have the same effect? The highest legal tribunal has given a clear answer: "His citizenship, whenever it exists, confers, under the act, citizenship upon her. The construction which would restrict the act to women whose husbands, at the time of marriage, are citizens, would exclude the far greater number, for whose benefit, as we think, the act was intended." [3]

Must an alien woman, in order to be naturalised by marriage to an American citizen, have resided in this country for five years? On several occasions jurists have divided on this question, but the negative view, maintained by Attorney-General Williams of the United States, is decisive. The statute, however, so Mr. Olney, Secretary of State has maintained, "cannot operate

[1] See Bayard, quoted in Van Dyne, p. 114.
[2] Stat., § 1994.
[3] Kelly v. Owen, 7 Wall., 496.

to naturalise by indirection or by executive interpretation a person who is an alien by birth and origin, who has never been within the jurisdiction of the United States and who at the time may be dwelling within a foreign jurisdiction."

25. While an alien woman may become an American citizen by marrying an American, is the opposite rule true, that an American woman becomes an alien by marrying a foreigner?

Van Dyne describes many cases in which the question has arisen, and shows that the answer has not been uniform. Yet he concludes that "the decided weight of authority is to the effect that the marriage of an American woman to an alien confers upon her the nationality of her husband." An English author, Cockburn, wrote thirty years ago" that in every country, except where the English law prevails, the nationality of a woman on marriage merges in that of her husband; she loses her own nationality and acquires his." Since then the English law, has, by statute, been harmonised with that of other nations.

26. What is the consequence of her husband's death? does she still remain a foreigner? Van Dyne says: "The tendency of opinion seems to be in favour of allowing the woman, upon the death of her husband, to resume her American citizenship, if she desire, on condition that she return to the United States, if residing abroad."[1] This statement of the rule or practice may be reinforced by Cockburn, who says: "Provision is made, in all the continental codes, for enabling a woman whose nationality of origin has been

changed into that of her husband, to resume, if so minded, her original nationality on becoming a widow; on the condition, however, if not resident in the country of origin, of returning to it."

27. One point more should be noticed. Does her absolute divorce from her husband affect her citizenship in the same way as the death of her husband? This question arose on the application of Mrs. Daisie Annie Newman Van Buren for a passport. She was the daughter of an American citizen and had married a Dutch baron. Like so many other American women married to foreign barons who have proved to be bears or worse, the marriage relation was severed and she returned to this country. The answer to the inquiry was given by Mr. Hay, Secretary of State, to the American minister at Berne, Switzerland. "In accordance," the Secretary says, "with the view which the Department has taken in several cases, when an American woman marries an alien, her condition from the standpoint of nationality is lost in that of her husband, as long as the marital union lasts. Upon its termination she may resume the nationality of her birth by returning to the United States to reside, if residing abroad, or acquire a new one. In this case Mrs. Van Buren's status under the laws of the Netherlands calls for no consideration. She does not live in that country, nor does she, apparently, intend to do so. Her divorce having been lawfully obtained, her marital relations with Baron Van Buren having ceased, her domicile being bona fide in this country, you may properly issue a passport in her favour."

28. Lastly, persons have been naturalised on several great occasions by treaty. The most noteworthy of these are the treaty of 1794 with Great Britain, with France in 1803, with Spain in 1819 and 1898, and with Mexico in 1848 and 1853. The status of the Porto Ricans and Filipinos under the last treaty with Spain has been the subject of most elaborate exposition by the highest federal tribunal in the so-called Insular cases.

29. At common law an alien may acquire real estate by deed or devise, but cannot hold it against the state. The sale to such a purchaser is a cause of forfeiture to the state in a proceeding established for that purpose if it chooses to act,[1] if it does not act, the alien purchaser may maintain a suit for land thus acquired like any other person.[2]

An alien may also acquire real estate from the state by legislative action ,and a deed or patent may be issued to him by the proper officer. The right to acquire, hold and dispose of real estate may be granted to aliens by the United States by treaty, or by statute, and in most of them nearly all the disabilities affecting resident aliens by the common law, have been removed. By the Nebraska constitution "no distinction shall ever be made between resident aliens and citizens in reference to the possession, enjoyment or descent of property." Non-resident aliens, however, are regarded very differently. Thus, in Idaho aliens who have not declared their intention to become citi-

[1] Wright v. Saddler, 20 N. Y., 320, 324.
[2] Gray v. Kauffman, 82 Tex., 65.

zens cannot acquire farming lands. Again, aliens may enforce liens and judgments against real property and may also inherit it; but, if it be not sold within five years, it escheats or belongs to the state. In Illinois, too, although an alient may acquire real property like citizens, it escheats to the state, unless he becomes a citizen within six years from the time he acquiring ownership. In other words, the policy of the state is to permit anyone to acquire and hold real property and to give him all the time necessary for becoming a citizen. If, on the other hand, he refuses to become a citizen, he is divested of ownership—a regulation which seems to be, in every way, wise as the permanent ownership of real property ought not to be vested in persons residing in other countries.

In Iowa non-resident aliens may acquire and hold one hundred and twenty acres of real property, but no more, unless it is taken by devise or descent. When thus acquired it may be held for twenty years. At the end of that time it escheats to the state, unless it has been conveyed to a bona fide purchaser for value, or unless the alien has become a resident of the state. The law in Kansas may be thus stated: A man may acquire real property if he has declared his intention of becoming a citizen, and may, during the succeeding six years, dispose of it in the same manner as a citizen on complying with the conditions of registry. Non-resident aliens, however, are debarred from acquiring the title to real estate, except by descent or devise; and when thus acquired, they must dispose of the same within three years, unless they are minors, who have

two years longer. Should they not comply with the law, it escheats to the state, unless it has been sold to a bona fide purchaser for value. Minor aliens who are residents of the United States may acquire title to land by purchase, and may hold it for six years after declaring their intention to become citizens.

In Kentucky an alien may take by devise or descent, and hold the land for eight years. In Louisiana there are no statutory restrictions on aliens relating to real property. In Minnesota aliens who have not declared their intention to become citizens cannot acquire real property except by devise or inheritance. The law there does not apply to right by treaties or to actual settlers who do not own more than one hundred and fifty acres. They may also acquire and hold lots of fifty feet frontage by three hundred feet deep in any incorporated city. In Texas a somewhat different regulation prevails. Resident aliens have the same rights as citizens, but if they discontinue their residence they must dispose of their real estate within ten years.

In Washington the ownership of lands by aliens who have not declared their intention to become citizens is prohibited, except when acquired by inheritance, by mortgage, or in the regular course of justice in collecting a debt. Conveyances to, or in trust for, aliens also are void. But this prohibition does not extend to mineral lands and those necessary for their development. In Wisconsin non-resident aliens cannot acquire by purchase more than three hundred and twenty acres. In Nebraska no non-resident, alien foreigner who has not declared his intention to become a citizen

of the United States, nor any corporation or association not incorporated under the laws of the state shall acquire or own, hold or possess, by right, title or descent accruing hereafter, any real estate in the state of Nebraska. Lastly may be mentioned Wyoming, in which non-resident aliens are not permitted to acquire any real estate, except by inheritance, or in the ordinary course of justice in collecting a debt.

The naturalization of an alien will confirm a title which he had previously acquired either by purchase or by devise.

From this review of the rights of aliens, it will be seen that the laws are extremely liberal, and aim at giving those who reside here and intend to become citizens the same rights as are enjoyed by the citizens themselves. The chief restriction is on non-residents—the law aiming to give them a few years in which to dispose of land that may come to them by inheritance or otherwise, and prohibiting them from retaining its permanent ownership. This is the general underlying idea of the legislation pertaining to aliens.

CHAPTER IV

MODES OF OWNING LAND

§ 1. Acquisition of Land by Purchase. Deeds

1. Agreement to purchase must be in writing.
2. What this must contain.
3. When an oral bargain can be enforced.
4. Money paid can be recovered.
5. Law of place of location governs the parties.
6. Kinds of deeds:
   - *a.*—Quit-claim,
   - *b.*—Indenture,
   - *c.*—Warranty,
   - *d.*—Lease.
7. On what a deed must be written.
8. Filling blanks.
9. Alterations:
   - *a.*—Unimportant alterations,
   - *b.*—Are they presumed to be made before or after the delivery of the writing?
   - *c.*—The safe practice.
10. Lost deed.
11. Deed by minor:
    - *a.*—Is his deed void or voidable?
    - *b.*—What is a confirmation?
    - *c.*—Illustrations.
12. Deed by insane person.

13. Deed by executor or administrator.
14. Deed by married woman.
15. Execution of deed through fraud.
16. Names of grantor and grantee should appear in deed.
17. Grantee must exist:
    a.—Deed to fictitious person,
    b.—To an estate of a person,
    c.—To future estates immediately given,
    d.—To estate in remainder,
    e.—To trustee of future estate,
    f.—To an unorganized corporation.
18. Need of seal:
    a.—No one need be present when affixed,
    b.—Several may use same seal,
    c.—Seal of corporations,
    d.—What is a seal?
19. Witnesses.
20. Execution by agent or attorney.
21. Mode of signing.
22. Reading of deed by grantor.
23. Dating.
24. Delivery:
    a.—Test of, is control,
    b.—Deed must be complete,
    c.—May be actual or verbal,
    d.—Delivery is matter of intention,
    e.—Delivery when deed is unread,
    f.—Delivery of deed to corporation,
    g.—Delivery to unknown grantee,
    h.—Delivery before fulfilling condition,

i.—Delivery may relate backward,
j.—Deed of confirmation,
k.—Effect of delivery between parties.

25. Acceptance.
26. Delivery of deed as an escrow.
27. Recording.
28. Rights of parties between delivery and recording.
29. Acknowledgment.
30. It is a ministerial act.
31. Reason for acknowledging certificate.
32. Nature and effect of certificate.
33. Acknowledgment by married woman.
34. Effect of defective acknowledgment.
35. Authority of person to take it.
36. Acknowledgment taken in foreign country.
37. Only owner of land can acknowledge it.
38. Evidence to explain deed.
39. Correction of deed.
40. Description:
    a.—Monuments control courses and distances,
    b.—Kinds of monuments,
    c.—Which kind is of highest value,
    d.—Monuments that mark public lands,
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41. Boundary by non-navigable stream.
42. Boundary by tidal navigable stream.
43. Boundary by non-tidal navigable stream.
44. Boundary by a lake.
45. Boundary by a highway.
46. Boundary by a private way.
47. Boundary by a park.

48. Quantity.
49. Reference to other deeds.
50. What passes.
51. Covenants:
    a.—Number,
    b.—Covenant of right to convey,
    c.—Covenant of possession,
    d.—Covenant against encumbrances,
    e.—Covenants for quiet enjoyment and warranty,
    f.—Special covenants,
    g.—Implied covenants,
    h.—Covenant does not protect purchaser from surety,
    i.—Distinction between real and personal covenants,
    j.—What covenants are personal, and what real,
    k.—Tendency is to regard covenants as real,
    l.—What particular covenants run with the land,
    m.—Covenants concerning encumbrances,
    n.—Covenants concerning quiet enjoyment,
    o.—Covenants concerning right to convey,
    p.—Damage for breaking a covenant.

1. One of the most common ways of acquiring land is by purchase. After making an oral bargain, the preparation and delivery of the deed is often delayed for several days, or a longer period. If there is no written memorandum of the bargain it is possible for either party to decline to fulfil his part of the agreement, and the other is powerless to enforce it. Morally of course, this is wrong; but the law can do nothing

unless the oral bargain was reduced to some kind of writing.

2. What must this writing contain? By a statute, essentially a copy of an English one, the writing must describe the land sufficiently to identify it; and must be signed by the person whom the other seeks to hold. A better form of writing is signed by both parties, and then each can hold the other. They can sign with a lead pencil; even a stamped signature will suffice. An agent can sign for his principal. The writing need not express the amount or consideration that is to be paid for the land. A letter or series of letters from which the terms of a contract can be collected will satisfy the law.[1]

3. Notwithstanding this statute, there are cases in which an oral bargain can be enforced. This may seem to be an overthrow of the statute itself. When parties have actually made an agreement to convey, and the vendor or seller has actually transferred the possession to the vendee, this is such evidence of a purchase or transfer that the courts will recognise the transaction and compel its full performance. If the agreement were not carried out by the vendor, there would be manifest fraud, and the vendee would be a trespasser. In such cases the courts compel the vendor to execute his promise and to give a deed to the other party to whom he has sold his land. Possession by the purchaser is always an indispensable element in such a legal proceeding.

To this rule there is one exception. Between a

[1] Sometimes the vendor, besides his promise to give a deed, gives also a bond that he will execute the consequence. For form see Vol. VI, Appendix, No. 18.

land-lord and a tenant possession would be no evidence of a contract of sale, because the tenant is occupying under a lease.

4. The payment of purchase money is not sufficient proof of an agreement to sustain an action for compelling the execution of the contract. Once the law was otherwise; courts acted on such evidence and compelled the other party to perform his agreement. Experience proved that this was a dangerous practice. Sometimes a fraud was committed by maintaining that money was given in part payment for the land, when, in truth, it was given for something else. So the courts finally abandoned this ground; therefore, when money is now paid, instead of compelling the vendor to fulfil his promise by giving a deed, he is required to refund the money.

5. It is a maxim of the law that the title to lands can be acquired or lost only by the laws of the state where they are located. The rule has been recently thus expressed: "No man has any vested right to dispose of any property, by whatever title he holds, in any other way than that by which the law prescribes."

6. In conveying land by one individual to another several kinds of deed are in use:[1]

(*a*) First may be mentioned a release or quit-claim deed, whereby the grantor or seller conveys or parts with whatever interest he may have in the land conveyed. This deed is signed only by the grantor, and becomes effective by delivery to, and acceptance by, the purchaser.

[1] For forms of deeds see Vol. VI, Appendix, No. 1.

(*b*) The second kind of deed is known as an indenture. This is signed by all the parties. In many cases copies are made corresponding with the number of parties or individuals signing the instrument.

(*c*) Thirdly may be mentioned a deed of warranty, which may be in form like a quit-claim deed, or a deed of indenture with additional stipulations, called covenants, that are of the highest importance. These covenants give the deed a higher character than that of a release or quit-claim; and for that reason it is generally used in conveying real estate in nearly every state of the Union.

(*d*) In conveying an interest in land for a short period the writing is called a lease, though it is also a deed, but differing in many ways from those above mentioned.

7. A deed must be written, so it is said, on parchment or paper; this is not strictly true, for, if one were written on stone, as were the laws of Moses, it would doubtless answer the law. Nor does the law require accuracy or precision in the use of words, or observance of grammatical rules. Any writing from which the intention of the parties can be clearly gathered is sufficient by the modern law.

8. It is a fundamental principle that the writing must be completed before delivery, and that additions, alterations, erasures, or interlineations must be made before the delivery of the deed. It made afterward they either avoid the instrument, or are of no effect. Says Washburn: "If the contract thereby evidenced is an executory one, any material alteration made by

the holder or a stranger will avoid it, unless done by consent of the maker, or without the knowledge and assent of the holder."[1]

9. (*a*) A different rule applies to unimportant alterations. Thus, a lessee, after the lessor's death, altered the words "E Street" to "W Street"; this was not a material alteration, because other parts of the lease showed that the original should have been "W Street." We are now going on dangerous ground. Such alterations will stand only when they are not material, or clearly appear from other parts of the instrument to be its true purpose or design. Thus, a mortgagee who, without the other party's knowledge, increases the amount of the consideration, thereby invalidates the mortgage. A grantee who admits an alteration of his deed by himself, but with the grantor's consent, must prove that such consent was given.

(*b*) What is the legal presumption concerning the time of making them—before or after the delivery of the writing? Different rules have been declared. Perhaps the Missouri rule is as rational as any other that may be applied. The law will presume that the alteration was made before, or at least contemporaneously with, the signing of the writing, unless peculiar circumstances of suspicion are evident upon the face, and even then the whole question is one for the jury to settle upon the facts, what and where and with what intention the alteration was made.

(*c*) The safe practice is, in all cases after making the erasure or alteration, to note it in some way on the

[1] Washburn on Real Property, § 2094, p. 220 (6th Edition).

writing itself, showing that it was made before its delivery.[1] By every good conveyancer such a clause is added.[2]

10. The loss of a deed after its delivery does not destroy the title of the grantee. A court of equity will establish the possession of a party who claims title under a lost deed, or grant such relief as the circumstances of the case may require. Again, in such a case should the purchaser fail to prove his title, but should prove the loss of his deed and the payment of the money he may recover it, or, if the title of a part should fail, he can recover a part of the money he has paid.[3]

11. Not every person is legally capable of making a deed. Of these, minors may be mentioned first. They cannot make a conveyance of real estate beyond attack or questioning. The courts differ widely concerning the worth of such a conveyance.

(*a*) Some affirm that such a deed is voidable; in other words, the minor, after attaining his majority, can set it aside or declare he will not be bound thereby, as he pleases. Other courts declare that such a deed is void absolutely; is of no more account than a piece of waste paper. The general tendency of the courts is toward the doctrine of voidability; wherever this prevails, the transaction, after the minor becomes of age, may endure.

[1] Washburn, § 2097, p. 223.

[2] Devlin says: "Where there has been a material alteration in a deed, the deed to the extent of such altration has become a new deed, and the alteration may be of such a character as entirely to change the original deed. It should, therefore, to give effect to the alteration, be redelivered, and, if it has been acknowledged before alteration, should be again acknowledged." §462a, Vol. I, p. 593.

[3] 94 Am. St. Rep., 469.

(*b*) In these states, the question arising in every case, after a minor has attained his majority, is, has he taken any action to show whether he has avoided or confirmed his deed? Whether he has done so or not is a question of ordinary fact. Time, often, is very important in answering this question. If, for example, a minor who has given a deed takes no action to avoid or set it aside months after attaining his majority it is held that he approves or ratifies his action. Forgetfulness to act will not suffice. But, if he were sick at the time of attaining his majority the law lengthens the period for acting.

(*c*) Many illustrations might be given of the ratification of deeds by minors. In one of them, in which a tenant had occupied a house for six years after the lessor became of age, the courts held that he had thereby ratified the lease. In another case acquiescence for four years was deemed sufficient.

In Vermont a minor who wishes to avoid his deed made in infancy must do so within reasonable time after coming of age. Likewise, in Connecticut, neglect to disaffirm the deed within a reasonable time after attaining majority is sufficient evidence of ratification. In Missouri a grantor, after attaining his majority, expressed himself satisfied with his former act, and promised to execute a confirmatory deed, but ten months afterward died before doing so; this was a ratification. In Massachusetts the courts say any distinctive act or recognition is competent evidence of a ratification.

12. The deeds of insane people fall nearly in the

same category as those of minors. They are not capable of giving deeds absolutely binding on them. It is sometimes declared that they cannot receive a deed for the same reason.

13. Executors and administrators are, to some extent, disqualified from acting. As they act in a representative capacity, they can go only so far as the law prescribes. Trustees, technically so called, can act only in a limited way, and if they exceed their limitations are either bound personally or not at all.

14. Married women are also in this category. Formerly, their right to act was extremely limited; by statute, in all the states, larger rights have been given to them to convey their property. Nevertheless, as we shall hereafter learn, they have not as complete rights as unmarried women. Again, neither husband nor wife can make a conveyance directly to each other. It is true that property is often conveyed by one to the other, through the medium of a third person, not by direct action.

In many states a married woman can now convey her own property without joinder of her husband's written consent expressed in the deed, except so far as this may be necessary to defeat his right as tenant by the curtesy. This would seem to be essentially the same limitation as the law attaches to his right to convey his real estate, for, in many states, he cannot do this without her written consent. In other words, he cannot cut off her right of dower without her voluntary action. As the states have prescribed by statute the rights of a married woman to make

contracts, including her authority to part with her lands, nothing further need be said on the subject in this place.

Formerly, she could not appoint an attorney to convey her land for her. By the modern rule, whereever she has the right to sell her land, independently of her husband, she can exercise this authority by an attorney. There has been a great deal of learning expended on this subject, but, in one of the federal cases, Justice Peckham said there was no particular reason, when a wife can convey directly, why she cannot authorise another to do the act for her. "The reasoning which would prevent it is, as we think, too technical, fragile, and refined for constant use." [1]

15. The deed of one who is induced by the fraud of a grantee is not void but voidable. The grantor may rescind the contract within a reasonable time after discovering the fraud, repay the consideration, and demand the recovery of his land.

16. In making a deed the names of the grantor and the grantee should appear; sometimes mistakes are made, for conveyances are often written by persons who have a very imperfect knowledge of the mode of preparing and executing such writings. The law looks at the substance of things rather than at technical forms; consequently, a deed in which the name Edward appears in the earlier part, but which is signed Edmund, is valid. Another principle, quite in harmony with this, has been adopted; one who accepts a deed in which his name is not correctly stated or spelled is

[1] Williams v. Paine, 169 U. S., 67.

deemed to have adopted that name for the purpose of acquiring and holding the title to the property.

The omission of a person's middle name will not vitiate a deed, for the law requires only one Christian name. Since the time of William the Conqueror, a full name consists of one Christian name, or given name, and one surname or patronymic, the two, using the Christian name first and the surname, constituting the legal name of a person. Anyone may have as many middle names or initials as are given to him, or as he chooses to take. They do not affect his legal name, and may, or may not, be inserted in a deed without affecting its legal validity. For the same reason a mistake in the middle initial of the name is not material in legal proceedings, nor is a similar omission in the acknowledgment of a deed which contains the letter in the body of the deed itself.

To call a person senior instead of junior, as intended, or vice versa, does not affect the validity of a deed. Again, to describe a person by the character given to him by general repute will suffice, even though it is not the literal truth. Likewise, to call a man by the name he is usually called, though this differ from his baptismal name. But a deed to, or by, a person by a surname only, without something to show who was intended, would be void.

17. Property must, at all times, have an owner; it is impossible for one person to part with his ownership unless there is another person to take it from him. Consequently, a deed to a person having no existence, passes no title from the grantor.

(*a*) A deed, therefore, to a fictitious person is void. But a distinction exists between a fictitious person and a person existing with a fictitious name. In the former case the deed is worthless; in the latter, if the true person can be ascertained, the title to him will pass.

(*b*) A deed to an estate of a named person is a nullity, for it does not name a grantee who is in being and capable of taking the estate conveyed. And a deed conveying property to the children of a named person will be effective in conveying to children who were living at the time of executing the deed, but will not include children born afterward. Furthermore, a deed to children who should be alive at a certain date would be absolutely void.

(*c*) To sustain an immediate estate there must be an existing person. Indeed, it would be a contradiction in terms to attempt to grant such an estate to a person not in existence.

(*d*) But an estate in remainder, or a future estate, may be granted to a person who is not then living. For example, an estate to A and his children or his heirs, though there be no children or heirs in existence at the time of making the conveyance, is valid. The unborn grantee must appear during the continuance of the present or intermediate estate, or at the moment of its termination, otherwise there is no one in existence to whom the remainder can descend, and it would be void.

(*e*) Sometimes a future estate is created through the medium of a trustee. The present immediate estate

is given to the trustee, who is to hold it for a given period, or until other persons appear to whom the future estate is to go. In these cases the trustee is said to hold the legal estate, and the beneficiary the equitable. This mode of conveying property has played a prominent part in both American and English law, and will be fully considered hereafter.

(*f*) A deed to a corporation not yet organised, and consequently not actually existing, is a nullity, for there is not a grantee capable of taking it. This is the general rule, though, in some states, a deed to an unincorporated company, which is to come into being at an early date, may be valid. Cases of this kind occasionally happen in this country; in England they are frequent.

18. It is a universal practice in all cases to affix a seal to a conveyance of land, and even to all leases.

(*a*) It is of no importance in affixing the seal whether the grantor or grantee, attorney, or stranger, were present; the essential thing is to do this before the delivery of the writing.

(*b*) Any number of grantors may use the same seal. A deed prepared for several to execute, to which only a part of them append seals to their names, will be valid provided it be properly delivered by the signers. Of course, it will not bind those who do not sign. If it is signed by all and asserts that the grantors have affixed their seals, and there are not as many seals as names, the law presumes that some of the signers have adopted the seals of the others. This is one of those numerous presumptions which play

such an important, and generally useful, part in the law.

(*c*) A corporation need not use its corporate seal in executing a deed; the use of any seal will suffice. This is not the law everywhere; the federal courts, especially, hold that a corporation must use its corporate seal and affix it by competent authority. Furthermore, a corporate seal may be impeached by showing that it was affixed by a person without authority.

(*d*) What is a seal, to some extent is an open question. The true significance of one has largely passed away. Formerly, seals were used by the great landowners when conveying land, as the highest proof of their action, because generally they were unable to write their names. As every person had a seal of his own, the mark was quite as distinctive as a written signature. Since most persons now know how to write their names, a seal has less significance. Consequently, either by statute or common law, the use of L. S. enclosed in brackets, thus [L. S.], is often as effective as a seal of wax or a wafer.

19. In nearly all states the names of the witnesses who have attested its execution are subscribed to a deed. By the common law an attestation was not required to give validity to a deed, nor is this required even by statute in all the states. It is, though, a general practice. In many states, by statutory requirement, every deed must have one or two subscribing witnesses; without them the deed is invalid. Thus, in Michigan, where two witnesses are required, a

deed attested by only one was declared to be not a legal conveyance.

A witness need not see a party to a deed write his name. It is enough if he asks the witness to subscribe to the attestation clause, and the latter complies in the signer's presence. Witnesses to deeds cannot, like witnesses to the wills of testators, express opinions concerning the capacity of the signers; they can merely testify to the fact of signing as a witness, nothing more.

20. A deed may be executed by a grantor, or by his agent or attorney. When executing a deed in the latter manner, an attorney must have ample authority of a character as high as that of the deed itself. Generally, he is given authority by a sealed writing, called a power of attorney, and this, also, is recorded like the deed he executes. By thus recording the authority of the agent to act, the record of the transaction is made complete.

The authority of corporations to execute deeds and hold real estate depends on their charters and the general statutes of the state.

21. Formerly, the courts were exceedingly strict in construing the precise form of signing. Thus, a deed signed by a man as attorney or agent, without stating the name of the principal, was regarded as the deed of the agent or attorney, and the additional word, *attorney* or *agent*, was rejected as surplusage. The books are full of deeds condemned by reason of the attorney's failure to follow the precise legal form. Without reviewing these, the matter may be cut short

by saying that the modern courts regard the intention of the signer. When, therefore, the fact clearly appears that a person is acting as agent or attorney for another, and not for himself, his intention will be given to the writing. Had this broad and rational principle been adopted earlier many a deed would have been construed very differently.

As towns, cities, and other public bodies must act by attorney, the deeds signed by their attorneys are regarded in all cases as the acts of the bodies they represent.

22. It is not necessary, under ordinary circumstances, to read a deed to the grantor, and, as he is presumed to know its contents, he cannot avoid it on the ground of ignorance. "A deed cannot be avoided in a court of law except for fraud in its execution, or other fraud or imposition practised upon the grantor in procuring his signature and seal."[1] A different rule, though, must be applied to a person who cannot read, or who is blind or ignorant. He can insist on having the deed read to him, and, if this is not done, or if it is read falsely, or its contents are falsely stated, it may be set aside.

23. A deed is dated, and this is presumed to be the time of the execution and delivery. In indentures the date is usually at the beginning; in single deeds, at the end. Notwithstanding this presumption, proof may be given to show that the date inserted was not the true date of its delivery. Again, it is said that a date is immaterial, and, consequently, a deed would

[1] 3 Washburn, § 2141. See Truman v. Lore, 14 Ohio St., 144, 155.

not be affected if the date were impossible, like the 30th of February.

24. Delivery is essential to render a deed valid; but, like so many other apparently simple matters in the law, it is not always easy to determine what is a delivery.

To effect a delivery two things are needful. The grantor must give up control of the deed, and the grantee must actually accept it, and thereby accept the estate therein conveyed. Consequently, to render this action valid, both the grantor and the grantee must at that time be capable of thus acting. The delivery of a deed after the grantor's death is not effective.[1]

(*a*) So long as the grantor retains the legal control of the deed, the title does not pass. Though a deed may be completed in every respect, except actual delivery, the transaction is not effective until this is done, and in good faith. Therefore, were a deed taken out of a drawer by a thief and delivered to the grantee named therein, no title would pass to him from the grantor.

(*b*) Again, the instrument must be complete. When, therefore, it is given to another for the purpose of ascertaining whether it is satisfactory or not, or of doing something in connection therewith—to make an examination of the title, for example—this is prelim-

[1] "A valid delivery is accomplished when the conduct and acts of a grantor manifest a present intent to dispose of the title conveyed by the deed. There is no particular form necessary, but any act or thing which manifests such an intent is sufficient to establish it. It is always a question of fact, and must be determined by the circumstances surrounding each particular transaction." Lorigan, J., Kenniff v. Caulfield, 14 Cal., 40.

inary to final action, and has no effect in the way of a final delivery of the instrument.

(*c*) A delivery may be actual—that is, by doing something and saying nothing; or, it may be verbal by saying something and doing nothing; or, it may be by both speech and action. A wife, a few days before her death, made a deed to her husband, put it in an envelope, sealed it, and then told him to put the envelope with his papers, which he did. There was a valid delivery, though she did not tell him about the contents of the paper. As Washburn says, "there must be an intention to give effect to the deed. If the deed is lying on a table in the presence of the parties, and the grantor tells the grantee to take it, and this is done, the delivery is complete. But should one, to whom a deed is made, get possession without the grantor's intention, it would not avail him anything, nor transfer the title."

(*d*) Delivery is largely a matter of intention. Did the grantor by words and acts indicate an intention to part with control of the deed, and regard it as a present, operative and binding conveyance.

(*e*) If a party who can read executes a deed put before him for execution, or, if unable to read, does not demand its reading and explanation, he cannot deny its execution, unless in some way a fraud was practised on him.

(*f*) Ordinarily, nothing further is required to constitute a delivery of a deed by a corporation than to put its seal thereon by the consent of the organisation, unless its execution is by an attorney. When thus

executed, it does not become the corporation's deed until a formal delivery. A delivery of a deed to an authorised agent of a corporation is a delivery to the corporation itself.

(*g*) A deed may be delivered to a grantee or to a stranger unknown to the person for whose benefit it is made when this is the maker's intention. In such a case the delivery is effective the moment the grantee's assent is given, even though the grantor, during the interval, may have died. In one case a soldier, just before entering service, made a conveyance to his wife, which he left with other papers in her possession, though she had no knowledge of it. Discovering the deed after his death, the court held that this was a sufficient delivery.

(*h*) A deed that is delivered before fulfilling the condition that may be attached thereto will have no effect. The act is a manifest wrong to the grantor and is not binding on him. Whether this be done through either fraud or mistake, the effect is the same; the land is not transferred. The books liken such a transfer to that of a deed which the grantee has stolen, whereby no title is gained, though, in form, the instrument may be complete.

(*i*) After the deed has been delivered the grantee's title often relates back to the time of putting the deed into the possession of the third party. The title does not always run backward in this manner. Whether the deed has a retroactive effect or not depends rather on the intention of the parties.

(*j*) A deed of confirmation may make a voidable

estate good. On the other hand, the deed does not strengthen the estate that is absolutely void.

(*k*) Of course, the delivery of a deed is valid between the parties themselves, and all others who have knowledge of the transaction, or have any reason to suppose that the conveyance has been made. The occasions on which a land-owner attempts to practise a fraud like this are happily rare, yet they are frequent enough to require a statement of the principles of law that apply when they occur.

What does happen, frequently, is the attachment of the land by creditors of the grantor. The law favours the grantee in all cases of this kind, and the general rule, is, if the sale has been made in good faith, although the grantee has neglected to put his deed on record within the time prescribed by law, nevertheless, he retains his ownership as perfectly as if no creditor had attempted to take away his land from him.

25. The grantee's acceptance or assent must also be in the grantor's lifetime, unless the act of delivery is one of a continuing nature, such as leaving a deed on deposit to be accepted by the grantee at his election. Thus, a father made a deed to his son and left it in the registrar's office to be recorded. But as the latter had no knowledge of it, he could not have assented to the conveyance. The deed, therefore, never passed any title to the land to the son, and consequently his heirs had no title thereto.

The law presumes that a deed found in the grantee's possession has been delivered and accepted. This

is a presumption and nothing more, though the burden of proof is on the attacking party to show the fact to be otherwise.

When a deed is delivered to a person who is under legal disability—a minor or insane person, for example—nothing need be done on his part to indicate its acceptance. If the grant is beneficial to him the law will regard the delivery as an acceptance.

26. Sometimes a deed is delivered to a person as an escrow. The object of doing this is to require the grantee to perform some condition before giving him the writing. For example, a deed may be delivered to another to keep until the grantee is ready to pay the consideration. A deed thus delivered, until the failure of the condition, cannot be recalled; it is beyond the maker's control, otherwise it would not partake of this character.

Whether a deed is an escrow or not depends largely on the intention of the parties. The guiding principle is whether the grantor has entirely parted with his control over the instrument. Whenever he has, then the delivery is complete. In all cases, to possess this quality of an escrow, it must be completely executed in all respects except the formal delivery to the grantee. When, therefore, a deed is placed in the hands of a third person, as an agent, servant, friend, or bailee of the grantor for safe keeping only, and not for delivery to the grantee, the transfer does not constitute a delivery, and the deed fails for lack of complete execution.

Finally, when a deed is thus given to a third per-

son for delivery to another, it is proper that some words should be added to indicate this intention of the parties. If none are added this intention should be expressed in a formal manner.

To a composition deed a somewhat different principle applies. If this is delivered to a creditor on condition that it shall be void unless all the creditors sign, it is an escrow, without any binding obligation until all the creditors comply with the terms.

The delivery of a deed as an escrow has no effect until the performance of the condition. Therefore, a creditor of the grantor who should levy on the land in order to satisfy a debt of some kind would hold it by virtue of his levy in preference to the grantee in the deed. Again, the grantee would take subject to any grant made by the grantor after the delivery in escrow and before the happening of the condition. As an example, a grant of right of way over the grantor's land to a railroad company. The grant would be effective to convey the land, notwithstanding the execution and delivery of the deed to a third party to be kept by him until the fulfilment of the condition by the grantee.

27. In this country the practice is very general to record all conveyances of land, in public offices established for that purpose. This practice has prevailed from the earliest times, and it has wrought wonders in the way of simplifying the titles to real estate and in rendering their transfer easy and secure. Anyone can readily understand that, where no system of recording prevails, and a title is simply oral

or written on a piece of paper which may be easily lost, possession of the property purchased is essential to render the owner secure. With the progress of civilisation and the perfecting of a system for recording deeds, the possession of property is becoming less essential as a security to the owner. In other language, by virtue of our system of recording deeds, it is safe enough to buy property, although the buyer may have never seen it, and has no intention of taking formal possession. Indeed, he is just as secure as he would be by going on the land and making a formal entry, as was done in the olden time.

The recording of a deed is not conclusive proof of its delivery and acceptance, even though the instrument is taken to the recorder's office for record by the grantee or his agent. Cases have happened in which an instrument has been delivered, recorded, and afterward taken away from the recorder's office by the grantor, without any knowledge whatever by the grantee of the transaction. In such cases, as there is no delivery, there can be no acceptance.

Generally speaking, the recording of a deed is a notice to all the world of the transaction; but in fact, this is not always so, even between a grantor and grantee, as there is no particular reason why an unknown grantee should visit the recorder's office for the purpose of finding out whether anyone has made a grant to him or not.

28. What are the rights of parties between the time of delivery and recording a deed? Surely there ought to be no division of legal opinion on such an

important subject. As the object of recording is to give notice of the transaction to all the world, so any transfer made between the time of delivery and recording ought not to affect any party who is acting in good faith. Suppose a grantor should make a second conveyance between the time of making the first and its delivery for record in the public office. The purchaser who buys in good faith, and pays the price therefor, ought not to suffer by his transaction; but rather the first grantee, because it is his unquestioned duty, under ordinary circumstances, to leave his deed for record as soon as possible after receiving it.

In many states though, by statute, purchasers have three months or even longer period to record their deeds, during which they are fully protected from the consequences of any action by the vendor. Of course, "between the parties to the deed, or the heirs or devisees of the grantor, and the grantee and those claiming under him, the validity of the deed is not affected by the want of record; and the same is true as to all purchasers who may take a subsequent deed, knowing of the existence of a prior one." [1]

29. In some states the law requires a deed to be acknowledged in order to pass the title. In others a deed may convey a title as against the grantor and his heirs, even though it be not acknowledged. Generally the acknowledgment is a requirement merely of the law regulating the registration of deeds. In most states the statutes prescribe the manner of

[1] 3 Washburn, § 2200, p. 298.

acknowledging or proving a deed before it can be recorded. A statute declaring an instrument void unless it is acknowledged is not unconstitutional.

A principle of general application is, a deed must be acknowledged by the laws of the state where the land lies. The certificate of acknowledgment must be a substantial compliance with the requirement of the law.

30. An acknowledgment is a ministerial, and not a judicial act;[1] consequently, an officer who thus serves, and is related to the party making the acknowledgment, is not disqualified by reason of his relationship. But an acknowledgment by an officer who is interested in the conveyance would not be legal. Is a bank official, who is also a stockholder, disqualified from taking or releasing a mortgage to or from the bank? The courts generally have said that he was, but statutes of recent years have been passed in the states authorising him to act in such cases. Furthermore, it must be done by an officer within the territorial limits of his appointment. A notary public of Pennsylvania could not acknowledge a deed in another state, or an officer having authority to act in a single county could not take an acknowledgment of a deed in another.

An acknowledgment of a deed can be made through the telephone. Says Justice Barclay: "When a person places himself in connection with the telephone system through an instrument in his office he thereby invites communication in relation to his business through that channel. Conversations so held are as

[1] Washburn, § 2194, p. 287.

admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business carried on." [1]

31. An important reason for acknowledging instruments is to prepare them for use as evidence. Those which are not acknowledged or proved as required by statute cannot be admitted as evidence without proving that they have been executed. But even when not acknowledged, they may be used for some legal purposes.

32. A certificate of an officer is not conclusive evidence of its truthfulness, as the law says it is prima facie evidence and nothing more. It is presumed to be correct, but may be set aside or impeached by proper evidence.

The courts strive to uphold an acknowledgment whenever this can be done with due regard to the statute prescribing the mode of making it; consequently, obvious clerical errors are not regarded, such as the misspelling of the grantor's name, and other apparent mistakes.

33. At common law a married woman had no power to convey land, indeed to make contracts of any kind. Her right, therefore, to make deeds is by statute, which in every state prescribes how her acknowledgment shall be taken. The principal end sought to be accomplished by this is to render the act her own, and not one of coercion by her husband. The statutes generally require that the transfer of any interest she

[1] 97 Mo., 473.

may have in land must be acknowledged, for example, a release of dower, a power of attorney to convey her property, or the sale of the entire or lesser interest in her land. "A married woman has no capacity to contract for the sale of her real estate, or to convey it except in the precise statutory mode conferring the power."[1]

In most of the states the statutes require a private and separate examination of the wife apart from her husband. The certificate by the acknowledging officer must show this fact, or it will be void. "The acknowledgment should be made after the examination and explanation. It is not sufficient that she acknowledged the deed with her husband, and it was subsequently fully explained to her, and she declared that she had executed it voluntarily and did not desire to retract it."[2]

34. What is the effect of a defective acknowledgment? Unless a statute is in the way, such an acknowledgment is valid against all who know of its existence. But against a subsequent purchaser, who does not know, the instrument has no validity. Again, as such an instrument ought not to be recorded, the recording will not be effective against persons having no actual notice. On the other hand, if the certificate of acknowledgment is regular on its face, it is the recording officer's duty to record it, and the record will serve as a notice to all, notwithstanding the hidden defect contained in the certificate.

A defective acknowledgment of a married woman's

[1] Glidden v. Strupler, 52 Pa., 400. [2] Devlin on Deeds, § 552.

deed is worthless, nor will a court of equity compel her to execute an agreement thus acknowledged. A subsequent conveyance, however, by her of the same property will be valid. Nor can life be given to a defective deed by recording it. And when her deed is void because defectively acknowledged, it cannot be ratified during her married life except by a proper acknowledgment, at which time it becomes effective. After her husband's death she may ratify such a deed by another delivery.

35. The person taking an acknowledgment must possess proper authority, otherwise it is worthless. The statutes of the different states prescribe who may thus act. They include judges, justices of the peace, notaries public, clerks of courts of records, commissioners of deeds, recorders, and mayors of cities. An acknowledgment by an officer in fact is effective even if he is not a legal officer. Furthermore, if an officer, whoever he may be, has authority to appoint a deputy, he also may take acknowledgments, except in those states in which the act is deemed a judicial one. In these a deputy cannot act unless authorised by statute.

36. An acknowledgment taken in a foreign country is not effective in any state unless taken before a person authorised by the laws of that state to take acknowledgments. The record of a deed purporting to be acknowledged before an officer not known to the laws of a state cannot be admitted as evidence, unless his authority to thus act be shown.[1] Authority

[1] De Segond v. Culver, 10 Ohio, 188.

is given by most or all of the states to notaries public, also to the consuls, vice consuls and commercial agents of the United States.

37. No one can acknowledge a deed except the grantor or person who has sold the land. But an acknowledgment by one of several grantors will satisfy the statute of some states with respect to registration, and use as evidence. The same rule applies to the deed of a partnership.

An agent or attorney who has authority to sign a deed, has authority also to acknowledge it, and the same rule applies to a deputy, and a corporate officer. But a married woman cannot authorise an attorney to make for her an acknowledgment; this she must do herself. A public officer who has executed a deed during his term of office may acknowledge it after his term has expired.[1]

38. Oral or parol evidence may be admitted to explain words of art or technical terms used in a deed, which are not readily understood. But, in a deed containing everything needful for understanding the intention of the parties there is no room or occasion for introducing oral evidence.

39. Under some circumstances a deed may be corrected. The general rule is, it may be amended in all cases of accident, fraud or mistake. If the grantor is unwilling to make the proper correction, whereby it will conform, to the intention of the parties, the grantee may apply to a court of equity for such a correc-

[1] Town of Lemington v. Stevens, 48 Vt., 38.

tion as will render the instrument a fair and honest expression of the true agreement.

40. Formerly, when land was of less value than at present, the description or boundary of land conveyed by deed was often very imperfect. With the denser settlement of the country, more care is taken in describing it. One of the rules of construction is that an imperfect description cannot be mended or controlled by oral evidence. For this reason, among others, the extremest care should be taken to define the premises with the utmost certainty. Another rule of construction is that a deed should favour the grantee, but this is applied only when other rules fail to remove the doubt or ambiguity. It need hardly be added that the construction put on the deed should be reasonable.

(*a*) In construing a description, monuments will control courses and distances. This is based on a sound principle. They are less likely to be destroyed, or be wrong, than courses or distances. In making ordinary surveys courses may vary by reason of local attraction of the compass; and errors in distance may be due to inequalities of the surface.

(*b*) There are two kinds of monuments—natural and artificial. Among the natural monuments are streams, ponds, lakes, shores, trees and highways, which are silent but effective informants. When lost or removed, or there is doubt which of two objects is the monument, oral evidence may be admitted to clear up the difficulty.

(*c*) The location of a monument is a question of

fact for a jury. Again, it is asserted that natural monuments are of higher value than artificial ones, but this rule, perhaps, may be questioned, especially if the artificial monument has been prepared with great care and is of durable nature. Surely, a large stone that is put in a secure place, is a more secure boundary than a tree that may be blown down, or than a small, wayward stream whose course may be changed by a freshet. When a line is described as running from one monument to another, the law always contemplates a straight line. Furthermore, a line that is described as running from a given point to a natural object, like a highway or a stream, unless the course or length of the line is given, must be the shortest one that can be drawn from the point to the object.

(*d*) In marking the public lands of the Western territories, the statutes have prescribed some rules that are imperative. The surveys often call for artificial monuments to designate the corners of the tract. These monuments control the courses and distances. To this rule two exceptions may be noted; first, in a deed that calls for natural monuments; and second, in a description that refers to a township and section, one or more corners of which have been lost. In the first case the general rule concerning monuments controls the boundary, both the artificial monuments and the courses and distances, although maps and field-notes would indicate a different location. But when a natural and artificial monument cannot be ascertained by any proper evidence, then course and dis-

tance must cover the location of the boundary, and this rule prevails with respect to lost corners. Oral evidence is admitted to establish the location of monuments, and even hearsay evidence, and evidence of general reputation, may be admitted in such cases.

(*e*) Courses and distances of a small city lot play a more prominent part in determining the boundaries. The reason is that the courses and distances are ascertained with more care, are shorter and, therefore, it is possible to define them with greater accuracy than in the case of a farm or a very large tract. When walls, fences, and the like form monuments of some appreciable thickness, the boundary is always to the centre of the monument. In the cities especially land is becoming so valuable as to make this point worthy of notice.

41. The boundary of land by a non-navigable stream is the centre, changing with its course. Again, one who owns both banks has a title to the land between them and may lawfully maintain a fence across the stream.

It is not true, though, that the centre of a stream always forms the boundary line. If land is described as bounded on, or running along a river, the centre is the boundary. But the stream is excluded by bounding land on the bank, or shore, or by other words clearly indicating an intention to exclude the stream itself.

42. The boundary by a tidal navigable stream is the high-water mark. In Massachusetts and some other states, by statute, low-water mark forms the boundary

of land located on navigable rivers and by the sea. In both cases a riparian owner has a right to erect and maintain wharves extending from his land, subject to public control. The same rule applies to him as applies to the owners of land bounded by the sea. The shore or beach is the property of the State.

The title to a navigable stream forming the boundary of a state passes to low-water mark, and the grantee can use the land between high and low-water mark for his own private purpose, provided that his use does not interfere with the public rights of navigation, fishery and improvements.

43. The boundary by a non-tidal navigable stream is not so clearly determined. In some states, by statute, the lands over which navigable streams flow belong to the state, and the implication clearly is that the land of all other streams belongs to the adjacent owners, the line between them running in the centre. The lands within a state that makes no claim to them extend to the centre of the stream, subject, of course, to the public rights of navigation.

44. The boundary of a natural pond or lake is low-water mark; and the same rule applies to the boundary to a natural pond, raised artificially. Nor will the conversion of a fresh-water pond into a salt pond by artificial means change the law concerning the rights of the land-owners. To an artificial pond a different rule applies, the boundary is through the centre.

The title to the bed of all lakes, ponds, and navigable rivers to the line of ordinary high-water mark within the boundaries of many states was vested in them on

their admission into the Union. Their waters are thus forever preserved for the enjoyment of their citizens to the same extent that the public are entitled to enjoy tidal waters at the common law. Nor can anyone divert or transfer the public title to such lands, by grant or otherwise, to individuals or an association.

Again, the state title does not change by reason of the fact that the lakes and ponds are artificially filled so as to raise the land above the surface of the water.

45. The same rules of construction apply to land bounded by a highway as to that bounded by a non-navigable stream. If the words of description are "by or along a highway," and the like, the land extends to the thread or centre of the way, and nothing short of clearly expressive words will work an exclusion. Even some descriptions of land "by the side" of a highway have not thus operated, for the reason that the scrivener evidently intended to convey to the centre. The cases of exclusion, therefore, are very rare. One reason seems to be almost conclusive; namely, that the grantor would have no use for the land used as the highway unless he retained the land on the opposite side, or unless it is clearly shown that there was something to be gained by retaining it as against the grantee—a mine, for example.

The adjoining owners of land bounded by a highway which is subsequently abandoned, can extend their lines to the centre. A different rule may be applied if one of the adjoining proprietors can prove that he had a right to more than half.

Again, the covenants in a deed of land bounded by a street or highway do not relate to the land over which the public exercise public rights. In other words, the covenants pertain simply to the land enclosed, and not to the soil in which the public exercises its right of passage.

46. To land bounded by a private way no right of way is acquired by the grantee. If the grantor does not own the land no covenant will be implied from a reference to a deed for the purpose of description.

47. To land bounded by a park a somewhat different principle applies. The grantee takes only to the interior line of the park, and not to the centre.

48. The quantity of land conveyed is sometimes given, more often the exact quantity is unknown; in no case is the quantity permitted to control the courses, distances, or monuments. Generally, deeds contain a clause, "more or less," in order to save the grantor from liability on his covenants with respect to the quantity. By inserting this clause no return of any part of the purchase money can be demanded, should there be a deficiency in the quantity, unless the statement is infected with fraud.

49. Sometimes, instead of giving a description of the land, the deed refers to other deeds containing a description. When this is done the effect is similar to an insertion of the description in the subsequent deed. In like manner plans or maps of monuments, courses and distances, to which reference is made, become a part of the conveyance.

50. Whatever belongs to the land granted will pass

therewith, although not specially mentioned: houses, window-blinds, doors, mines, and the like. Whatever is a fixture goes with the premises. The law regards the grantor's right to remove things far more narrowly than those of the tenant, and for a sound reason. It is reasonable to suppose that, as a tenant's occupancy is only temporary, he does not intend to benefit his landlord by affixing things to the soil for the lessor's enjoyment after the cessation of the tenancy. On the other hand, a grantor who is the owner puts everything, so the law presumes, on the land—houses, improvements of all kinds—with a view to permanency, and not of removal. Rarely, indeed, can things which form naturally a part of the realty, and were annexed for its more perfect enjoyment, be removed by the vendor after the sale. In like manner buildings that he has erected, whatever may be the mode of their construction, are a part of the realty and pass therewith to the purchaser.

An exception or reservation may be made in a deed, which, of course, has the effect of retaining the title to whatever is excepted or reserved. If repugnant to the grant, the exception or reservation is void.

51. Another important part of a deed consists of the covenants of title, as they are called. These stipulations or agreements are of great practical importance, yet are very imperfectly understood.

(*a*) There are five of these, though not all are found in modern conveyances; covenants of seisin, or possession; the right to convey; against encumbrances; for quiet enjoyment; and warranty. In many states only

the last covenant is generally employed. In the older states all of them are often found. Like many other legal principles, they run into one another and are not clearly separated, and, for that reason, will be considered under less than five heads.

(*b*) The right to convey is the right to convey the title to the land itself at the time of the sale. But, if he does not own the legal title, or is not in possession of the land itself, the covenant is at once broken, and the grantee can bring an action against him for conveying what he did not own.

(*c*) The covenant of possession is defined to be an assurance that the grantor has both in quantity and quality the various estates which he professes to convey; therefore, any outstanding right or title which diminishes the quality or quantity will be a breach of the covenant. It is broken if the estate is of less duration than that described. The covenant is broken also when the land conveyed has fences, buildings or other erections belonging to other persons, unless there is an exception made to them in the deed. But the existence of an easement—for example, a highway or a railroad—is not a breach of the covenant, nor an outstanding judgment or right of dower, for the reason that the grantee is presumed to know of their existence.

(*d*) The covenant against encumbrances is intended to provide security against the claims of third persons. The most common form of encumbrance is a mortgage: but there are others: a right of dower, a judgment lien, taxes, an outstanding lease. There may

be easements on the land, railroads, private rights of way, rights to water-courses, the right to cut trees, maintain dams and aqueducts; though in some states this rule is not so sweeping. "In Pennsylvania, Kentucky, Wisconsin, Iowa, and Virginia a public highway in use is not deemed an encumbrance in the conveyance of lands. And such is the tendency of the opinion of the courts of New York. But in Indiana, Alabama, Vermont, Massachusetts, Connecticut, New Hampshire and Maine, a public highway is an encumbrance, and constitutes a breach of the covenants in a deed of the land over which it exists." [1]

(*e*) The covenant for quiet enjoyment is in common use in England, but, although inserted in the deed in America, requires little construction, as it is of essentially the same nature as the covenant of warranty. This covenant is the most general of all. In the Western and Southern states, especially, it is the one most generally used.

This is a personal obligation binding the warrantor and his personal representatives, and also his heirs and devisees, when they are expressly mentioned. Even then their liability is not indefinite, but only to the extent of the assets or property received by them from the warrantor. As a personal covenant or agreement its virtue is gone after a period fixed by statute, and differing considerably in the several states. When it is broken the convenantee is entitled to an action against the covenantor.[2]

(*f*) Besides these covenants, deeds sometimes con-

[1] 3 Washburn, § 2385, p. 441.
[2] Tiedeman on Real Property, § 856, p. 699.

tain special covenants of warranty against claims, past transactions, special damages, defects, etc. A not uncommon covenant is that the grantor will not erect a building on an adjoining lot, or not within a specified distance from the line, etc. The mere mention of these will suffice, because the operation of them is essentially the same as in other cases. They are special in every sense, and how far they bind depends entirely on their construction.

(*g*) Deeds may contain implied covenants, but the law seems to be opposed to raising these when there are express ones. Nevertheless, both express and implied covenants that are not inconsistent with each other may exist; when they do the implied covenants fail so far as they are opposed to the express ones.

(*h*) A covenant does not protect the vendee or purchaser from suits, or save him harmless from the expense of them. Thus, suppose a person claims a private right of way over the land of the purchaser, and, having been refused the right to exercise it, brings his action to enforce his right. Though failing in his suit, nevertheless the purchaser has incurred no little vexation of spirit and loss of money in defending his title. Yet he cannot call on his grantor to reimburse him. The grantor would reply, "I warranted your title to be good, and the suit has proved the warrant to be good. I am sorry that anyone should have been so foolish as to set up a false claim thereon and attempt to enforce it; but I did not promise that everybody would let you alone, for, though not

knowing much, I do know that fools are still numerous."

(*i*) Besides the covenants mentioned, there is another division into personal and real, and it is important to understand the distinction between them. Personal covenants exist simply between the parties to a deed; real covenants run with the land—in other words, they bind the covenantor, the covenantee, and their heirs and assigns.

Thus, if a covenant is personal between A and B and the covenantee, B, sells the land to C, who finds a flaw in the title, he cannot sue A, because the warrant or covenant was between A and B, and not between A and C. A covenant, therefore, is said to be personal when it binds only the original parties to a deed. When does this happen?

Suppose A covenants and agrees to bind himself, his heirs and his assigns by his deed. The covenantee, of course, thinks that A's heirs and assigns are bound, but this is not always so. The language says so, but the law declares that the covenator did not mean what he says. What, then, did he mean?

The law declares that if the covenator asserted in his deed that he was the owner and possessor of the land sold, when in fact he was not, this is a personal covenant and does not run with the land, and does not, therefore, bind A's heirs. The reason for this rule is extremely artificial and narrow. A covenant never continues to run with land after it is broken. As A was not the owner of the land at the time of the sale, his covenant was broken instantly, and so,

notwithstanding the words he used in the deed, it did not run with the land and it bound only himself.

What remedy, then, if any, has the covenantee? He can sue A on his personal covenant to recover for the damage, if he is alive; if he is dead, the covenantee can sue A's representative—that is, his executor or administrator if he still possess any legal capacity, but he cannot sue A's heirs; they escape.

(*j*) Having shown the importance of the distinction between personal and real covenants, the next inquiry is, what covenants or agreements are personal, and what are real? Instead of giving plain, practical answers to this question, the law is sadly confused, nor do the courts manifest much disposition to aid individuals through the thicket. This is one of the subjects that ought to be lighted up by a statute.

First, it is an essential element of a real covenant that it has for its object something annexed to, or inherent in, the land. The first criterion for determining whether a given covenant runs with the land, or not, is its nature and purpose. When this is not decisive the intention of the parties as shown in their deed must determine the question.

Second, all covenants relating to the title of the land that are not broken on its transfer to the heir or assignee are real covenants.

Third, a covenant is said to run with the land whenever the liability to perform it, or the right to take advantage of it, passes to the assignee.

Fourth, to create a covenant running with the land, there must be a privity of estate, so the law says,

between the parties. This is an old feudal phrase, which means that a mutual relationship must exist between the grantor and the grantee and his assignees to carry a covenant of warranty to subsequent grantees. Unless, therefore, there is such a mutuality or succession of interest, a covenant will not run with the land.

(*k*) There is a growing tendency to regard covenants relating to land or its use as running therewith, and they are frequently enforced against subsequent grantees who have notice, even though there is no privity of estate. Consequently, a covenant concerning the title or use of land may be enforced in equity regardless of the question whether the covenant is one that runs with the land itself. By this rule covenants are sustained and enforced against assignees who have a notice stipulating for the particular mode of improvement, occupancy, or use of land. Covenants relating to the mode of building, or of using water rights, or air and the like, are essentially of this nature, because, through the stipulation contained in the deeds, all parties have notice of their existence.

(*l*) With these general principles before us we may pass to the consideration of the question, what particular covenants run with the land. The books contain a multitude of answers, but they are at hopeless variance. Generally, covenants that relate to buildings and improvements are of this nature. A covenant, for example, to erect a smelting mill or to set back a building from the street, or to build a new

chimney, and the like, runs with the land. So are covenants not to build on adjoining land, or to open a street of a certain width, to keep up a dam, flume, levee, pier, bulkhead, gate, and the like. Also, covenants creating easements, to insure building and to use the money for rebuilding in case of loss. In like manner covenants to erect and maintain fences, to pay mortgage debts, to save the expense of building a party-wall, to pay rent, to make repairs, and in many cases, covenants concerning the use of the property. Also, covenants to pay taxes and assessments, and to regulate and restrict the use of land. Besides these may be mentioned covenants to supply or furnish water. Of late years the courts have not had much difficulty in determining that such covenants are real and run with the land.

(*m*) There are other covenants, concerning which the courts have had the greatest difficulty in determining their character. First, the most important among them is the covenant respecting encumbrances. If one exists at all, it exists at the time of delivering the deed, and therefore it is broken immediately as soon as the deed is delivered. Consequently, many courts have held that, as the covenant is immediately broken, it comes to an end and cannot run with the land. This view is strenuously denied by other courts, and thus they are hopelessly divided.

(*n*) In like manner the courts are hopelessly divided over the important covenant relating to the quiet enjoyment of land. This is said to be, if broken at all, broken on the delivery of the deed, and, therefore,

does not run with the land. Nevertheless, other courts of equal authority maintain the opposite rule.

(*o*) Lastly may be mentioned covenants pertaining to the right to convey, which are broken immediately on execution of the deed, if at all. The courts are more harmonious in declaring these to be merely personal, and, therefore, not running with the land.

(*p*) When such an action has been brought what damages can be recovered? If the grantor acquires a paramount title before his grantee has been evicted by the adverse holder, the grantee can recover only nominal damages, for his title is rendered complete by the operation of the rule of estoppel. If he has been evicted before the grantor has acquired a perfect title, he is entitled to recover all the damages he has sustained.

§ 2. By Descent

1. Meaning of heir.
2. When title comes into existence.
3. Heir at law is only one who becomes owner without consent.
4. Degrees of relationship.
5. Rules of descent.
6. Ancestral estates.
7. Posthumous children.
8. Illegitimate children.
9. Law of what place applies.
10. Aliens.
11. The land may be taken from heir to pay ancestor's debts.

12. Claims or incomplete interests pass by descent.
13. Deductions for advancements.

1. An absolute, or lesser, estate or interest in land is acquired by the land-owner's death without disposing by will of his estate (if it be heritable); for, when this happens, the law disposes of his land to his heir or heirs. The term "heir," as thus used, is always a legal term, meaning the person or persons who are entitled to the inheritance.

2. Though the title comes into existence by the death of the owner or ancestor, by popular phrase persons are sometimes called heirs while the ancestor is living, and are known as heirs apparent and heirs presumptive. By an heir presumptive is meant a person who, should the ancestor die, would be his heir. For example, in England a daughter, who is an only child, would be an heir presumptive; afterward, if the ancestor had a son, this presumption would cease. An heir apparent is one who, should he survive, is certain to be the heir of an ancestor.

3. The heir at law is the only person who becomes the owner of land by law without his own act or assent. On him the law casts the title, without regard to his desire, nor can he disclaim if it he would. Of course, he can part with the title afterward, but the title itself, by operation of law, vests or inheres in him. He is entitled to the rent of lands thus coming to him until they are sold for the payment of debts, even though the ancestors should die insolvent. On one occasion an heir was entitled to damages from

building a railroad across the land of an ancestor after his death, although the land was subsequently sold for the payment of the ancestor's debts. In some states statutes provide that the executor or administrator shall receive and retain the rents and profits of the real estate until the settlement of the ancestor's affairs, or until they will not be needed for the payment of his indebtedness.

4. Consanguinity, or kindred by blood relationship, is the relation of persons descended from the same stock or a common ancestor. He is called the root or trunk of any stock from which the lines of descent are traced. This consanguinity is either lineal or collateral. It is lineal when existing between persons who descend in a direct line one from the other, as father, grandfather, and the like, and also when ascending, as son, grandson, and the like. Descent is collateral when persons are descended from a common stock, but not one from the other. Thus, a man and his nephew are collaterally related, as each may trace his line of descent to the same common ancestor. Were an ancestor to leave two children, and each of them two children, and so on through, fifteen generations, the original ancestor would have, of collaterial kindred in the fifteenth degree, nearly two hundred and seventy millions.

By the canon law,[1] the relationship between father and son is the first degree; between brothers, in the second degree; between uncle and nephew, in the third degree; between cousins, in the fourth degree, and so

[1] By canon law is meant the law of the ancient church.

on. By the common law the degrees are somewhat different. As the civil or canon law is usually followed in tracing descent, nothing need be said concerning the other.

5. In tracing the rules of descent the American law has departed widely from the English. The old Roman system has been regarded with more favour, though even from this there have been several noteworthy departures.

One of these pertains to lineal or direct descendants, who, if standing in an equal degree from their common ancestor, share equally. By the common law, each lineal branch takes the portion which his parent would have taken had he been living. Thus, suppose X should die, leaving seven nephews; one of them is a son of his brother A, three are sons of brother B, and the other three are sons of brother C. By the Roman law each nephew would take a seventh part of the estate; by the common law the nephew who is the son of the deceased brother A, would take one-third of the estate; the sons of brother B would take another third; and the sons of C the other third. In some of the states the Roman rule still prevails. By the English law great importance is laid on the possession, or the right of possessing lands, with respect to inheriting them. By the American law no distinction is made between the owner and the possessor of lands. Consequently, by our system the heirs of a reversioner, or remainder-man, by whom is meant a person who comes into the ownership of land after the termination of a prior estate, can take the same

as absolutely as if their ancestor had been in actual possession. A remainder-man, or reversioner, therefore, becomes a proper stock or root of descent; in other words, he can devise property like the owner of an entire estate. Consequently, when he dies intestate, his estate is distributed among his heirs in the same manner as the estate of an entire owner who was in full possession at the time of his death.

By the American statutes an estate of inheritance generally ascends to lineal ancestors when there are no lineal descendants, the law preferring the former to the collateral branches. Thus, a maternal grandmother, with her big spectacles, is preferred by the law to a paternal uncle, when a person dies leaving neither father, mother, brother, nor sister.[1]

[1] "Statutes directing the inheritance of an intestate, in default of any child or descendant, to go to the father, and if no father, to the mother, and if no mother, to the brothers and sisters, in equal shares, and to the descendants collectively of deceased brothers or sisters, if any, the share the deceased brother or sister would have been entitled to if alive at the time of the intestate's death, have been adopted in Arkansas, Colorado, New York, and South Carolina. In default of descendants the father takes by statute in preference to the mother, brothers, or sisters of the intestate in California, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, Oregon, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia. In the states of Iowa, Kansas, Kentucky, Pennsylvania, Texas, and Wisconsin the father takes equally with the mother, and if she be dead, her share also, in preference to brothers and sisters. In Georgia, Illinois, Indiana, Louisiana, and Missouri the father, mother, brothers and sisters take equally; while in Alabama, Delaware, Mississippi, New Jersey, North Carolina, and Ohio the father is preferred to the mother, but postponed to the brothers and sisters." 3 Kerr on Real Property, § 2264, p. 2283.

"According to the statutory provisions of some of the states, after father and mother, brothers and sisters are the next degree in the order of succession. These are not in the descending or ascending line of propinquity, but collateral to the estate. The brothers and sisters being members of the intestator's immediate family, are more nearly interested in the estate than any other relative, aside from the father and mother, and for this reason the law casts upon them the descent of the property, subject to the right of the surviving husband or wife, and frequently in connection with the father and mother. Brothers and sisters thus take in Alabama, Connecticut, Delaware,

There is a great difference in the American statutes with respect to inheriting by persons of the whole-and the half-blood. In some states no distinction is made between them; in the larger number the right of inheriting by the half-bloods is postponed another period, or to a more remote degree. In no state are they fully excluded.[1]

6. Another difference may be noted with respect to inheritances which come to an ancestor by descent. These are sometimes called ancestral estates, to distinguish them from estates acquired by purchase. In some states ancestral estates descend to the kindred who are of the blood of the ancestor whence they come, whether in the paternal or maternal line. This rule applies until the relations in the particular line have all been exhausted.

7. Posthumous children inherit in the same manner as children born in the lifetime of their father. This principle is universally adopted.

Mississippi, New Jersey, North Carolina, Ohio, and Pennsylvania. In Georgia, Illinois, Indiana, Louisiana, and Missouri brothers and sisters inherit with their parents, excluding more remote kin; while they are postponed to the father, and with the mother exclude remote kindred in Florida, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, Oregon, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia. In the states of Arkansas, Colorado, Iowa, Kansas, New York, Pennsylvania, Tennessee, Texas, and Wisconsin brothers and sisters and their descendants are postponed to father and mother, but take to the exclusion of remote kin." Ibid., § 2266.

[1] "In some states no essential distinction is made, the statute declaring collaterals of the half-blood to be entitled equally with those of the full-blood in the same degree, as in Illionis, Indiana, Maine, Massachusetts, New York, South Carolina, Rhode Island, Tennessee, Oregon, and Vermont. In other states the preference is given to collaterals of the whole blood as in Connecticut, Delaware, Georgia, Maryland, Mississippi, New Jersey, Ohio, Pennsylvania, and South Carolina. In still other of the states, as in Colorado, Florida, Kentucky, Missouri, Texas, Virginia, and West Virginia collaterals of the full-blood take full shares, and of the half-blood half shares; but in none of the states of the Union are the half-blood wholly excluded." Ibid., § 2267.

8. Illegitimate children can neither be heirs of anyone nor ancestors of anyone except their own issue. While this is the rule of the common law, by statute, in many states, illegitimate children can inherit from their mother.[1]

9. The law applying to the descent of land is that of the state where it is situated, and not the law of the domicile or home of the intestate. This principle, also, is of universal application.

10. The land of an alien who is authorized to hold real estate will descend to his lawful heirs, and not escheat or pass to the state. On one occasion a person who was authorized by special statute to hold land died, leaving an alien father and several alien brothers, and one brother who was authorized to hold land. The estate descended to him.

11. The land of every heir may be taken away from him for the purpose of paying the debts of the deceased owner. The law has wisely fixed a period of time within which creditors must act if they wish to appropriate the lands, or rather their value, of a person who has died, for paying their debts. Through neglect to act within this period, their rights to the land are forever cut off.

12. Claims or incomplete interests in land pass by descent. Thus, in our country, public lands are surveyed and afterward taken up by individuals on very liberal terms. The paper or instrument given to owners is called a patent. Once an individual took

[1] In New York they are excluded from inheriting if there be legitimate issue, but this statutory exception perhaps exists in no other state. See note 3, Tiedeman's Real Property, p. 632.

steps for getting a patent of a quarter section, but died before the grant was completed. It was surveyed, but not actually patented to, or secured by, the intestate during his life. The patent was issued to his heirs, and the court held that they took the land by descent, and not as purchasers. In another case lands were sold for taxes, but the purchaser died before the delivery of a deed; nevertheless they descended to his heirs. In another case the rent of land leased indefinitely went to the heirs of the landlord after his death, as a part of their inheritance.

13. In distributing estates among heirs deductions are sometimes made for advancements. These consist of sums which the ancestor has advanced to an heir, and charged against him with the expectation that they would be deducted from his portion of the estate. It is not an uncommon thing for a father to charge up the sums given to a spendthrift child, expecting that, on the settlement and division of the paternal estate, they will be deducted from that child's share. To justify their deduction this intention of the intestate must clearly appear.

§ 3. By Will

1. Who can make a will.
2. Minor can make a will.
3. Every interest in land may be devised.
4. Meaning of devise.
5. Statutory regulations about wills.
6. Will must be by law of the place where is the land.

7. Must be in writing.
8. Printed wills.
9. Must be signed.
10. When testator can make his mark.
11. Witnesses.
12. They must sign in testator's presence.
13. A witness cuts himself off from receiving anything.
14. When a will written by the testator requires no witnesses.
15. Credibility and competency of witnesses.
16. An executor can be a witness.
17. Competency of testator.
18. He must publish his will.
19. Who may be devisee or legatee. Corporation.
20. Description of devise.
21. Ambiguities.
22. From what time will take effect.
23. Lapsed legacies.
24. Revocation:
    a.—Some specific act is needful,
    b.—Destruction of it,
    c.—Marriage by a woman,
    d.—Accidental omission of legatee,
    e.—Subsequent birth of child,
    f.—Subsequent disposition of estate,
    g.—The making of a later will,
    h.—Revocation of joint wills.
25. Construction of will; intention.
26. Where the interest of the devisee rests in him.
27. Title by descent and devise compared.
28. Estate undevised rests in heir.

1. The law relating to wills is partly statutory and partly the creation of the courts. By the modern law persons have more authority or right to make wills than formerly. There was a time, not so very long ago, when a married woman could not make a will; now, in every state, she possesses this authority as fully as her unmarried sisters. By the common law males fourteen, and females twelve, years of age can dispose of their personal property.[1]

2. In many states a minor, though quite incapable of making an agreement, can make a will disposing of his property. A clear distinction exists between the two, for a will is a gift of property to take effect after the testator's death, and not an agreement or contract; therefore, a person who may be incapable by law to make a contract can make a gift which the law will recognise and enforce.

3. Every interest in land except a mere possibility may be devised. It includes, therefore, easements and all kinds of estates or interests in them, as well as every kind of personal property.

4. The term "devise" relates properly to the giving or parting with real estate; it will serve our purposes better to consider the whole subject of transferring both real and personal property by will in this section.

5. By a will the testator undertakes to dispose of his property after his death. All of the states in the Union have prescribed laws regulating the mode of making wills. These statutes provide, among other things how wills must be witnessed. Most of the states re-

[1] For forms of wills see Vol. VI, Appendix, No. 31.

quire three witnesses. Another general statement may be made: a witness usually is cut off from taking anything under a will. Many a legatee or devisee has lost the bequest given to him through ignorance of this rule.

6. The law governing real estate given by will is that of the state where the land is situated. A different rule applies to personal property. This is governed by the law of the domicile or home of the testator. These two rules cover all the property which can be bequeathed by a testator.

7. Most of the states require that a will should be in writing. No particular manner of composition is prescribed. A testator may write his will; in many cases it is written by himself. Indeed, once a husband and wife, both possessors of a large amount of property, amused themselves for many years by indulging in this kind of literary work. As some of them were not dated, after their death the question proved to be very difficult to decide which was the last, and, therefore the true will or final disposition of their property.

8. Printing, engraving and lithographing are held equivalent to writing. The instrument may be written with a pen or pencil; or it may be partly written and partly printed. Indeed, the courts go as far as possible toward sustaining any kind of a writing which in other respects is valid and proper.

9. A will must be signed, but a seal usually is not necessary,[1] except perhaps in the states of Vermont and New Hampshire. The statute of frauds requires

[1] It is almost everywhere appended.

a will to be in writing and signed or subscribed by the testator. He need not subscribe his name at the end; if this is done in any other place it will be effective; this rule, though, does not prevail everywhere.

10. A testator who is unable to write may make his mark, and this is a sufficient signing to comply with the law, whether common or statutory. Again, some one may guide the hand of a testator who is too weak from disease to write without assistance, and who requests this to be done. So, too, it is declared, if a testator through feebleness is unable to handle a pen, and requests another to sign his name for him, the signature will be a good signing without any mark whatever by the testator. Of course, when this is done, it should be accompanied by ample proof of the mode of signing, in order to escape all attacks that may be made on this unusual manner of execution.

11. The witnesses to a will are required to do more than the witnesses of a deed. In the latter case they are simply required to witness its execution; in witnessnig a will they are also judges of the testator's competency; consequently, whenever there is a legal dispute concerning the testator's capacity, they serve as expert witnesses, and are required to give their opinion of his mental capacity. The office of witness to a will is, therefore, important, and, as a person may be thus required to testify, he should always be selected with the view of his performing possibly this service.

12. The testator need not sign in the presence of the witnesses, but they must sign in his presence. It is better for all the witnesses, as well as the testator, to

be present at the time of performing this important act.

Many nice questions have arisen on this seemingly simple subject. Attestation in a different room, it is said, will be good, if the testator could see the witnesses when they were writing. Again, the witnesses may sign at different times and not in each other's presence, provided they all sign in the presence of the testator.

Generally, a will contains an attestation clause, declaring that the attesting was done in compliance with the statute in every particular. The witnesses sign below the attestation clause at the end of the will; in some states this is required by statute. By common law the witnesses are not required to sign in any particular place.

13. Though a devisee or legatee, by acting as a witness, cuts himself off from his share in the estate, the will itself is not thereby affected. Again, should there be witnesses to satisfy the statute, even though the name of such a devisee or legatee were not counted as a witness, his action in witnessing it would not affect its validity.

14. A will that is written by the testator himself is called a holograph, and, by the laws of several states, no witnesses thereto are required. It is said by some authorities that such a will is suspicious, especially of a testator feeble-minded and notoriously under the influence of the devisee or legatee, who thereby acquires a large share of the property.

15. Some of the statutes require a witness to be

credible, others to be competent. The two words are generally used synonymously. The law is very strict concerning the mode of signing and witnessing, and it is impossible to be too precise in all these particulars.

The three principal causes of incompetency in witnesses are mental imbecility, arising either from insanity or youthfulness; the commission of crime; and interest in the property willed. The most common cause of incompetency is that of interest. In most states a statute provides that a will is good even though the devise or legacy be void by reason of the witnessing of the instrument by the devisee or legatee. In some states there is another statute providing that, when a devisee has received no more by the will than he would have received as heir had the testator died intestate, he is a competent witness. The reason for this statute is apparent, for, even if there were no will, the person subscribing as witness would receive as much. In some states a witness who is incompetent by reason of interest may become competent by making an assignment or release of his interest.

It may be added that competency affects the wife or husband of the devisee or legatee. Thus, should a gift be made to one, and the other act as witness, the gift would be void. This rule does not prevail everywhere.

16. An executor or trustee can act as a witness.

17. The question of the competency of testators to dispose of their property may next be considered. Two classes are incompetent: minors and persons of unsound mind. Formerly, women were incompetent, but

several states have removed their incompetency by statute.

The sanity needful to comply with the law cannot be easily described. The inquiry is, when the testator's sanity is questioned, had he, at the time of executing his will, sufficient mental capacity to make it; not, whether he was sane or insane. Says Chief Justice Redfield: "He must have undoubtedly sufficient active memory to collect in his mind, without prompting, parts or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive their more obvious relations to each other and to form some rational judgment in relation to these." Courts have often declared it was not essential that the testator should be capable of managing business generally. His capacity is sufficient to make his will, provided he understands what he is doing. Of course, the question of capacity relates to the time of thus acting, and not to his condition either before or afterward.

A person who is not sane may make a will that is just as valid as any other, provided his insanity is not of a kind to affect his conduct as a testator. Again, an insane person may have lucid intervals during which he has a sufficient capacity to make a will. On one occasion a furious lunatic wrote a will, so proper and consistent in all its parts, that the court had no difficulty in sustaining it. In another case, that of an eminent lawyer, his will was set aside because, under the unfluence of a delusion concerning his brother, he disinherited him. The question, therefore, is one of

fact to be decided by the evidence in each particular case.

Lastly, a witness who is competent at the time of attesting a will does not become incompetent from any subsequent cause. The law simply requires competency at the time of his attestation.

18. A testator must publish his will; in other words, must declare to the witnesses that it is his last will and testament; and it is said that, unless he makes a declaration to this effect, the will is void. At the time of doing this the will must be completed.

19. Any person may be a devisee or legatee, including married women, minors, and corporations that are not prohibited by law from receiving a devise or legacy. A great question has long agitated the courts concerning a devise to a corporation not in existence. By the English law this can be done. In America perhaps no question has proved more difficult for the courts to decide. In one of the most recent cases it was decided that a testator could devise property to a trustee and entrust him with power to select or designate the object or objects of the testator's bounty. If, therefore, a testator creates a trust for a charitable purpose, defining his intention, and investing or creating the trustee with discretionary power over the application of his bounty to charitable purposes, the bequest will be sustained. If, in executing the trust, the trustee selects the beneficiaries and devises a scheme or plan by applying the funds given in accordance with the testator's intention, the courts will sustain the instrument and uphold the execution of the trust. One or

more trustees, however, must be selected. If neither a charity be named nor a trustee for executing it, then it would fail.

New York is the leading state denying this doctrine; likewise Virginia and Maryland, though less rigidly. In the former state the rule prevailing elsewhere is set aside by statute, destroying all trusts of this character. In a recent case the highest court in New York thus stated the law: "If there is a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement is void. Nor is any distinction made between trusts generally and a trust for charitable purposes."

20. No formality is required in order to describe the subject-matter of a devise. It must be described with sufficient clearness to identify it; the law requires nothing more.

21. Sometimes there are ambiguities in a will. The law recognises two kinds of ambiguities—patent and latent. When a latent ambiguity exists, parol evidence may be used to explain the intention of the testator. The use of parol evidence is limited to these cases.

22. A will takes effect from the death of the testator, and the validity of all gifts relate to that time. For example, a devise to one who died before the testator lapses or is of no effect. This principle of law has been corrected by statute, perhaps, in all the states. This provides, in a general way, that a son or other relative of the devisee shall take his place; in other words, the lineal heirs of the devisee take the portion

coming to him by will. The statutes vary in detail; some confining the provision to the lineal heirs of a deceased son or grandson, others extending the benefit to the general heirs of any relative who is named as a devisee, while others go still further and declare that the heirs of all devisees are capable of taking in their ancestor's place, thus avoiding altogether the doctrine of lapses in the event of the death of the devisee.

23. It is also a general rule, unless there be statutes to the contrary, that lapsed legacies and devises vest in the heir at law.

A devise to two or more joint tenants will not lapse on the death of one, not even his share, but the survivors take the entire estate.

A different rule applies to the devise of tenants in common. If one dies his portion lapses, and the others take their respective portions.

Under a devise to a class, the individuals of which change—for example, a devise "to my children"—those who survive the testator take the entire devise, and, in such a case, there can be no lapse unless all the persons included in the class have died before the testator.

24. (*a*) As a will is not effective until the testator's death, he can revoke it at his pleasure. To do this, a specific act of some kind is required. A revocation may be express, or implied when the testator does some act clearly inconsistent with the existence of the will. Thus, should a testator sell the land devised to A, this would operate as a revocation of the devise,

and, if this land composed the entire estate, the sale would operate as a revocation of the will.

(*b*) A very common way of revoking a will is by destroying it. If it is burnt or ceases to be, the revocation is complete. Not infrequently the action of a testator in revoking his will is not so clear or effective as it might be. It is sometimes said that as much capacity is required to revoke a will as to make one. At all events, a revocation does not become effective without clear action on the part of the testator indicating his intention to annul the instrument.

In one of the cases a testator had endorsed in his own handwriting "canceled" on the will, without signing it. This was held to be a revocation. In another case a testator had written against one of the bequests of the will "obsolete"; this was held not to work a revocation. It was simply a revocation of that bequest, not a destruction of the entire will.

In an Ohio case a testator was blind and called for his will, which was handed to him. After feeling of the seal, he handed it to another and told him to put it in the fire. Instead of doing this he put the will in his pocket and burned another piece of paper, telling the testator he had destroyed it. After the testator's death the will was produced and allowed, the courts declaring that he had done none of the acts which by statute was needful to revoke a will. Was not this case wrongly decided? Was not a fraud practised on the testator which the court ought to have regarded?

(*c*) What is the effect to a woman of marrying

after making her will? Generally, by statute, of revoking it, especially after the birth of children.

(*d*) Sometimes, a testator, by accident or intention, omits the name of a child or grandchild in his will, and then questions have arisen concerning his rights. The law regards the omission as accidental, and the omitted person may share the estate of the testator the same as if he had died intestate. This rule applies to the grand children as well as to children; also to children born after making of the will. Of course, a testator may intentionally omit a gift to a child or other relation and, when this intention clearly appears, it will be regarded.

(*e*) In many of the states the birth of a child after the making of a will operates as a revocation, the law regarding the non-destruction or non-revocation by the testator as an act of forgetfulness.

(*f*) The disposal by a testator during his lifetime of land, devised to a person, of course, revokes the devise. This also applies to cases of sale by a testator who has not yet made a conveyance.

(*g*) One of the most frequent ways of revoking a will is to make a subsequent will or codicil. The rule is universal that the last will speaks the mind of the testator. As a codicil is a supplemental will, it revokes the will itself only so far as the two may be inconsistent; but an entire will made at a later date operates to destroy the other. But a prior will that has been cancelled or revoked in an express manner cannot be revived without a republication in a manner as formal as the original will. Yet it has been declared that the

execution of a codicil which contains an express reference to a prior will is a sufficient republication to restore it to life.

(*h*) Sometimes joint or mutual wills are made; when they are they can be revoked by either testator until one or the other dies; after this event revocation by the survivor is impossible. The death of one of the testators is such a part performance of the agreement between them as to prevent the revocation by the other.

25. A cardinal rule in construing wills is intention. This the courts try to ascertain and regard unless it is contrary to positive law.

The courts have a stronger regard for the testator's intention in construing a will than a grantor's intention in construing a deed. Such is the rule of law, though with the progress of jurisprudence the intention of a grantor in a deed is regarded more scrupulously than it was a century ago. In other words, the spirit of justice more and more informs the law; rigid and technical rules meet with less and less favour.

Though the books contain thousands of cases pertaining to the construction of wills, no good purpose would be served, did space exist, by reproducing them. The principal rules of construction adopted by the courts are important, and these will now be given.

If an estate is devised to A for life, and the remainder after his death is to go to B, and A dies in the testator's lifetime, the estate goes directly to B on the death of the testator.

If the devise is to a wife for life in lieu of dower,

and the estate after her death is to go to her daughter and the wife declines to accept the devise, in like manner the daughter takes the estate at the death of the testator.

A devise of the rents and profits of land or the income is equivalent to the devise of the land itself, and is for life, or for all time, according to the words used in the devise.

A testator may create a charge on land in favour of a third person, and whoever takes the estate becomes chargeable therefor; in other language, takes the estate charged with the legacy. Whether he does, or does not, turns on the inquiry, whether the charge is a personal one on the devisee, or is on the land devised. In the former case it is not charged on the land; to create such a charge it must be clearly declared to be one.

26. The interest of a devisee vests immediately on the testator's death, and, after proving the will, relates back to that time. If, therefore, it be in terms a present devise, and the devisee is not in existence at the time of the testator's death, the devise is void.

27. If the title by will be the same in quantity and quality as the heir would take by descent, the law regards him as an owner by the latter manner. This rule of construction rests on the legal principle that a title by descent is of greater worth than a title by devise or will.

28. Any estate that a person leaves undevised vests at once in his heir. Yet it may be taken from him when needed for the payment of the testator's debts.

In contesting the title of an heir, intestacy is always presumed until the contrary is proved.

§ 4. By Occupancy and Prescription

1. Law pre-supposes a grant.
2. Why law favours this mode.
3. Personal occupation is not essential.
4. "Short Limitations."
5. The adverse possession must be continuous.
6. Title to flats may be thus acquired.
7. What acts are effective.
8. Effect of mistaken occupation.
9. Can tenant acquire a title against his landlord?
10. Adverse claimant may abandon possession.
11. Acquisition of rights in a party-wall.
12. In a non-navigable stream.
13. In a public square or highway.

1. Another mode of acquiring land is by prescription or adverse use. A favourite theory has been often repeated, that a grant was once made and that the deed of conveyance is lost.[1] This is one of the numerous fictions of the law, which play a nobler part than most of the fictions in ordinary literature.

2. One reason why the law favours this mode of acquisition is to quiet the title, so runs the phrase. An individual who has been in possession of a piece of land, openly and notoriously for the period fixed by the law, claiming, occupying, and using it as his own, whether holding the same under a deed of conveyance or without one, the law says shall henceforth be re-

[1] See 3 Kent's Com., 419.

garded as the true and lawful owner, with as perfect a right to use, sell and devise the same as any land acquired by inheritance, will, or purchase. This principle of law is far-reaching and effective. By its operation the titles to land, after a short period, become clearly known, and thus, at all times, the only disputed titles are very few compared with the entire number. The period varies in the states from three to thirty years.[1]

3. Personal occupation is not essential if other circumstances are sufficient to prove a continuous dominion. Nor need the land be improved nor cultivated. But if proof of this notice be given, the fence must be sufficient to protect the land against the intrusion of cattle. To enclose by felling trees and lopping them will not suffice, nor will a brush fence.

4. In some states there are statutes known as "short limitations," reducing very considerably the ordinary period. These apply to one who is in possession under "colour of title," in other words, the possessor in taking possession has acted on the strength of a conveyance or judicial decree, for example, occupancy under a junior or more recent patent from a state. By such occupancy, after a certain number of years, he is protected though an older patent had been issued by the state. Possession under such a short limitation act is usually required to be accompanied by the payment of taxes on the land by the possessor.[2]

5. The adverse possession must continue without

[1] In Louisiana the period is thirty years; in most of the states the period is fifteen or twenty years. See note to 3 Washburn, p. 148.
[2] Tiffany on Real Estate, § 437.

and again resumed the limitation begins to run only from the time of resuming. To recognise the true owner's right to possession is enough to break the continuity. It is also broken if the owner enters on the land openly and under a claim of right with a clearly asserted purpose of taking possession.

Can one make up the required period by adding or tacking to his possession that of another person previously in possession? An heir can tack his ancestor's possession to his own, and a remainder-man under a will can tack to his own possession that of the testator and the life tenant.

An adverse occupant may purchase an outstanding title without affecting the continuity of his possession, for one may buy his place at a smaller price than by costly litigation.

6. A title to flats, as well as to any other land, may be acquired by prescription or adverse possession. And the general rule applies to flats as to other lands. An actual exclusive possession constitutes a disposession which, if continued for the proper time, will ripen into a title. The title of everyone in flats, so long as they remain unoccupied and uninclosed, is subject to the public right of navigation; and therefore the use by everyone of flats by passing in vessels or boats or anchoring thereon, is not a dispossession, and however frequent or long continued, will not give a title by prescription. Like the travel on a highway, such use is presumed to be in the exercise of the public right, interruption for the statutory period, if interrupted, and is not adverse to the owner of the land. But if

flats are enclosed or otherwise actually occupied by a person claiming a right to the soil to the exclusion of all others, such use is a dispossession. Thus building a wharf and using the flats at the end and sides to lay vessels for the purpose of loading and unloading them is a dispossession of the flats covered by the wharf, and of the flats at its end and sides, so far as they are exclusively used.[1]

"No title to land under water can be acquired by the planting of oysters for any length of time without any other title than is acquired thereby."[2]

When no part of the land under water has been enclosed or occupied, and the only use has been in taking ice from the surface of the water by the owner of the adjoining property, he acquires no title thereto by adverse possession. "Taking ice from the surface of the water is no occupation of the land. It is akin to a profit taken from the soil of others."[3]

7. What acts are open and effective within the meaning of this rule? Says a well-known author: "Any visible or notorious acts which clearly evidence the intention to claim ownership and possession will be sufficient to establish the claim of the adverse possession." Acts of this nature are the maintenance of fences and the erection of buildings. Hence, the secret use of the premises unknown to the owner will not suffice. Nor would a survey thereof, nor the running of a line, nor the lopping of trees, indicate its location. In harmony with this principle, when the owners of

[1] Tufts v. City of Charleston, 117 Mass., 401.
[2] People v. Lowndes, 55 Hun, 469, 470.
[3] Governeur v. National Ice Co., 57 Hun, 474, 482.

adjacent lands claim only to the true line between them, the possession of one beyond is not adverse to that of the other; consequently each must conform to the true line as soon as it is defined. But if a purchaser encloses by mistake land contiguous to his own, believing that he is putting his fence on the true line, and keeps it there for the period required to gain ownership, he becomes the real owner.

Again, if two adjacent owners agree upon the location of a line for a division fence between them, and each holds possession for the statutory period up to that line, the title of each owner becomes perfect without reference to the true boundary line between them.

The mere occasional cutting and appropriation of timber is not such a possession of the land as will ripen into title by prescription against the true owner.[1] Nor will other acts like the making of a survey of the land and marking its boundaries, or paying taxes and excluding trespassers, or cultivating crops, or making bricks, boiling sugar, cultivating grass, pasturing hogs and cattle, depositing old machinery or wood thereon.[2]

Mere temporary breaks in the enclosure around the premises, if enough of the fence remain to give notice of the extent of the adverse claim to the owner, will not stop the running of the statute.[3] If there was still "an actual and visible appropriation of the land commenced and continued under a claim of all others."[4] On the other hand, if after the enclosure of land the

[1] Fowler v. Ecker, 107, Ga., 817.
[2] Williams v. Rand, 9 Tex. Civ. App., 631.
[3] Cyc., 991.
[4] Gunter v. Meade, 78 Tex., 634.

fence goes to decay and the land remains open for two or three years before it is again enclosed, the adverse possession is continuous.[1]

8. When land is occupied under a mistaken belief concerning the true line and with no intention to claim beyond it, such possession will not be effective against the true owner.[2] Tiffany says that in some states, in such a case, the possession is regarded as adverse, without reference to the fact that it is based on mistake, it being sufficient that actual and visible possession is taken under claim of right.[3]

9. The possession of a tenant is that of the landlord, and the latter's possession is restricted to the definite boundaries of the land leased. Consequently when the tenant extends the boundaries and takes possession of the adjoining land, claiming it as his own, his possession of the additional enclosure will be deemed adverse to that of the landlord.[4] The possession of land by a tenant for life is not adverse to that of the remainderman or reversioner.

10. No doubt an adverse claimant may abandon the land or surrender possession to the true owner at any time before his dispossession has ripened into a title. And if the true owner threatens the claimant with legal proceedings if he does not surrender possession and he yields, his possession is thereby effectively arrested.[5] Likewise an agreement to vacate for a consideration will have the same effect.[6]

[1] Settgast v. O'Donnell, 16 Tex. Civ. App., 56.
[2] Pharis v. Jones, 122 Mo., 125.
[3] § 443.
[4] Pharis v. Jones, 122 Mo., 125.
[5] Shaffer v. Lowry, 25 Pa., 252.
[6] Eldridge v. Parish, 6 Tex. Civ. App., 35.

11. When a party wall is erected to designate the boundary between two lots of land, and stands partly on the land of each owner, neither can be regarded as having any adverse possession of the land of the other on which the walls stands from the use made of it as a support to the building on his own lot, but he may acquire a prescriptive right to use the wall in the way he has used it.[1]

12. Possession may be acquired of a non-navigable stream by keeping up fish traps, erecting and repairing drains across it and using it every year, during the entire fishing season for the purpose of catching fish.[2]

13. Cases may arise in which private rights have grown up and become paramount to the public rights. For example, if lands designated on a map or plot as bounded by a public square are afterward enclosed by one and claimed by him as his private property, on which he pays taxes for many years, and exercises meanwhile the full rights of ownership and without any claim by the public, the public loses its rights therein.[3]

In many states the rights of the public in highways are not lost by the failure of the town, city or other public body to act. "Highways," says Elliott, "belong to the public and are peculiarly subject to legislative control, and if the legislature sees fit to exercise its power of control, through the agency of a municipal corporation, it is none the less a sovereign power. All that can be said in any event is that it is the sover-

[1] Williams v. Buchanan, 23 N. H., 533.
[2] Mitzel v. Drovers Bank, 44 Md., 248.
[3] Reuter v. Laive, 59 Wis. 892.

eign acting through the medium of local instrumentalities. The doctrine that highways can not be lost by adverse possession is supported by other well-settled principles of the law. There can be no rightful permanent private possession of a public street. Its obstruction is a nuisance punishable by indictment. . . . Even if title to a highway may be acquired by adverse possession, it is not every encroachment thereon that constitutes such possession. Setting out shade trees, making a sidewalk, fencing in a portion of the way, and the like, have been held insufficient to establish a claim by adverse possession."[1]

§ 5. By Accretion

1. Deposit.
2. Islands.
3. Alluvion.
4. Avulsion.
5. Land bounded on shore-lines of non-navigable rivers.
6. How owner may protect his land from wasting away.

1. Another mode of acquiring land is by actual making or deposit through the operation of natural causes. Thus, seaweed and other marine plants wafted on the shore become vested in the owner of the soil. In like manner, the owner of land which has been increased gradually through the action of water becomes entitled to the addition.

2. Sometimes islands are formed in the sea or in

[1] Sec. 883.

navigable rivers. These belong to the state. A different rule applies to islands formed in a non-navigable or non-tidal stream. In this an island that forms on one side of the thread belongs wholly to the landowner on that side; on both sides its ownership is divided. Lands that border a non-navigable stream belong to adjacent proprietors and are divided by the thread or central line. When this line slowly changes by the removal of the land from one side to the other, it still remains the boundary between the adjoining proprietors.

3. The owner of a strip along a river may rightfully retain an accumulation of sand, earth, loose stones, and gravel brought down by a river, and known as alluvion. Its chief characteristic is its imperceptible increase. Again, a riparian owner on a navigable stream has a right to remove and sell sand which has been deposited as alluvion between high- and low-water marks. Should a railroad company, for its own purpose, and not for the improvement of the stream, erect an obstruction on the opposite banks which should change the current and sweep away the sand and prevent further deposits, the riparian owner would be entitled to recover damages both for the sand thus swept away and for the loss of future alluvion.

On one of these occasions an accretion of land had formed along the levee at New Orleans on the bank of the river, which had been dedicated to public use. The alluvion was declared to be part of the public levee. If the land of a private owner should run down to a river without any intervening public way, he would have the

accretion to the bank as an incident of his ownership.[1]

To acquire ownership in this manner the accretion must be slow, imperceptible from day to day, though seen clearly enough after a considerable length of time. This may seem to be a somewhat indefinite test, yet has proved to be practical. The addition to lands during short periods is clearly seen at some places as well as the wasting away of lands at others. Yet the owners of the disappearing land have no claim on the owners of the new land, for the reason that there cannot be such an identification of the soil as will meet the requirements of the law. Legal principles are intended for practical operation, and it would be highly impracticable to reduce the rights of the gainers and losers of soil by these operations of nature to a nicer or more subtle principle.

This right to accretions is sometimes gained by the gradual lowering of the water of a lake or pond. These belong to the adjacent owner.

In New Jersey an increase of land adjacent to the sea is so gradual in some places that it cannot be observed while actually going on, although the change is visible from year to year. It was long ago decided that these accretions belong to the owner of the land to which they are made. But, in Louisiana, no private title is recognised to any accretions from the sea.

4. The process of taking soil by the sudden action of water from the land of one and depositing it on the land of another is known as avulsion. The soil still belongs to the first owner, unless his ownership is gone

[1] 3 Washburn § 1883, p. 72.

by the union of the soil with that of the second owner. Of course, to reclaim it, he would be obliged to prove its identity.[1]

5. In conveying land bounded on the shore line of navigable waters, the deed will include the accretions.

6. An owner of riparian land may rubble his bank to prevent the water from washing away his soil, but he cannot build anything into the stream that will change its current for the purpose of land protection.

§ 6. By Public Grant

1. Public ownership.
2. Construction of public deed.
3. Form of conveyance.
4. Certificate of entry.
5. Death of purchaser before issue of patent.
6. Assignment of certificate and issue of patent in assignor's name.
7. Identification of land.
8. Pre-emption right.
9. Cannot be assigned.
10. Conveyance by pre-emptor.
11. Creditors cannot levy on him.

1. All lands in this country are vested in the state or the United States. Those belonging to the general government, though located within the limits of the state, are under the former's control. Other public lands are under the control of the state, unless it has

[1] "Accretion, no matter to which side it adds ground, leaves the boundary still the centre of the channel. Avulsion has no effect on boundary, but leaves it in the centre of the old channel." New Orleans v. United States, 30 Pet., 662, 717.

conveyed them away. The laws that apply to lands are those of the state or territory wherein they are located. This principle applies everywhere.

2. There is another principle of construction. In grants between the state and an individual, a deed is always construed in favour of the state; in grants between one individual and another, the grantee is favoured.

3. There is no special form of conveying a public grant. It may be done by a special, or a general act of Congress. Millions of acres have been sold by authority of Congress, and general laws have been passed for conveying them. These will be briefly described.

4. A purchaser desiring land may, after the payment of his purchase money, receive from the register of lands a certificate of entry, which entitles him to a patent. This is a formal deed of conveyance required for the perfecting of his title, signed by the President of the United States, or the Secretary of the Interior, or by some other officer duly authorized by act of Congress.

By granting a certificate of entry to a person, he is vested with an imperfect legal title. It is good enough, however, to enable him to maintain an action of ejectment or trespass against a wrongdoer.[1] Again, after issuing the certificate to him, the land cannot be subsequently sold by the Government to another. The certificate also vests in the purchaser a sufficient title to enable him to sell or devise it.

[1] Brummett v. Pearle, 36 Ark., 471; Broussard v. Broussard, 43 La. Ann., 921.

5. Should the purchaser die before the patent is issued the land would descend to his heirs; of course, the patent ought then to be made out in their name; but, should it be issued in the name of the purchaser, not knowing of his death, his heirs could maintain their ownership.

6. A purchaser who assigns his certificate of entry and takes out a patent in his own name, as is sometimes done, will hold the legal title for his assignee; were he unwilling to convey to the true owner, he can be legally required to make a conveyance.

7. In all cases the land must be so described in the certificate of entry that it can be identified. An inaccurate or obscure description bars the right to a patent.

8. To encourage immigration and settlement of public lands, Congress long ago provided that an actual settler on public land, who makes an entry in the records of the land-office of his claim, with a proper description thereof, acquires a pre-emption right, which entitles him to a patent of the land thus occupied at a minimum price fixed by law. By taking such action he gains a superior claim over the land to all other persons. He cannot acquire, in this way, a right to all creation, but only a quarter section—one hundred and sixty acres. Furthermore, he cannot acquire any right in a reservation, or to land located in a town or city, or that which has already been taken, or is known to contain minerals. In other words, the law aims simply at the distribution of lands adapted to agricultural purposes.

Again, he must take oath that he does not own a section in the state or territory, or that he has not abandoned a claim elsewhere in the same state or territory in order to take up a quarter section of the public land. When he has thus pre-empted it he acquires essentially the same rights therein as are acquired by a person to whom a certificate of entry has been given. To perfect his title therefor he must pay the purchase money required by law within two and a half years after pre-empting the same.

9. His title, though incomplete prior to receiving the patent, descends to his heirs, but it cannot be assigned, thereby giving an assignee a right to the pre-emption as against the Government, or to anyone claiming under a patent.

10. But when the pre-emptor undertakes to convey before he has acquired the legal title, the assignee can acquire a title by instituting proper proceedings.

11. In like manner creditors cannot levy upon a pre-emption right and take it to discharge the owner's indebtedness.

§ 7. By Estoppel

1. What is an estoppel.
2. Kinds.
3. Nature and effect.
4. What must be done to establish an estoppel.
5. A misrepresentation that does not mislead is not an estoppel.
6. Effect of record as a notice.

7. A temporary possessor of land by agreement is estopped from denying other party's title.
8. Estoppel by deed.
9. Who are bound by an estoppel.
10. Estoppel does not bind grantor by repurchase.

1. Estoppel arises in those transactions wherein the law draws some conclusions from the acts of one party in favour of another concerning the ownership of lands, which it will not permit him to controvert or deny. Thus, should a man named Smith sign a deed as Jones, he would be estopped by law from proving that his name is Smith in order to avoid the deed he had signed. Putting the rule in a more general form, one who has the means of knowing his rights should not mislead another and influence him to do that which he would not, if he knew the true situation. One, therefore, who is unmindful or careless in his misrepresentations must bear the loss caused by his own conduct.

Sometimes the courts have declared a different rule; namely, that one who has misled another unintentionally can, after indemnifying, be permitted to regain fully his rights.

2. Estoppels are divided into two kinds: Estoppels by act, which arise by the positive act of an individual; and estoppels by deed, which spring from the construction of a deed or writing he may have given.

3. One or two illustrations may be given to show more clearly the nature and effect of this principle. A man dedicates a piece of land as a public square, which

is accepted, and individuals, supposing that the square will always exist, build larger and more costly houses than they otherwise would have done. The dedication cannot be afterward revoked. Nor does the estoppel depend on the length of the time such individuals have been occupying the ground around the square.

4. To establish an estoppel three things must be shown: First, that the person who is sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or, at least, had reason to believe that another would be influenced thereby; second, that the other party has been influenced by the act or declaration; third, that the other party will be prejudiced or injured by permitting the act or admission to be disproved.

Thus, A was about to purchase a piece of land adjoining B's. Not knowing the exact boundary line, he asked B to point it out, which was done. B knew at the time of A's inquiry that his object in inquiring was not curiosity, that he was about to become the purchaser. Having purchased the land, B was estopped from denying that the line he had pointed out to A was the true one.

The chief or fundamental thought in the judicial mind has always been the fraud that would be perpetrated on the innocent party if the other were permitted to deny his representation or action. The case above mentioned illustrates this idea as clearly as would a thousand others. A, for example, relying on B's statement, purchases the land and makes improvements,

buildings, perhaps, an expensive house and adorning the grounds. If B could afterward say that he had made a mistake, acting without the full knowledge of his own rights, and were permitted to show that the true line was somewhere else, A's would be the loss, perhaps a serious one. The law estops B from doing such a thing.[1]

5. An incorrect representation concerning one's boundary line or other matter, though not misleading, because the other party has the same or better knowledge himself, creates no estoppel. The element of fraud is absent, because, whatever may have been the intention of the party who made the statement, the other is not defrauded or injured thereby.

6. A man who holds a title to land that has been duly recorded thereby gives all the notice required by law, so long as he remains passive. It is only when another is purchasing land on which the seller has some unrecorded lien or charge, unknown to the purchaser, that he is bound to give notice. In such a case, should he fail to give the notice, he would be estopped from setting up a claim against the purchaser. In a case of this kind a tenant had erected a bowling alley on the land of his landlord, and, during the term of the lease, the lessor offered the estate at auction. The lessee put in a bid, but another bid higher. The

[1] The Supreme Court of Pennsylvania has thus stated the rule: "The primary ground of the doctrine is, that it would be a fraud on the part of a party to assert what his previous conduct had denied, when, on the faith of that denial, others have acted. The element of fraud is essential either in the intention on the part of the party estopped or in the effect of the evidence which he attempts to set up."

owner of the bowling alley was not estopped from claiming and removing it as a fixture, nothing having been said about it at the time of the sale. In judicial language, "it is only when silence becomes a fraud that it postpones."[1] No man can set up another's act or declaration as the ground of an estoppel unless he has been misled or deceived thereby.

7. One who enters into the possession of land under an executory contract with another is estopped from denying the latter's title, for this would be a violation of good faith in obtaining possession.

In like manner one who is under an obligation to give up the possession of the land to another, a lessee, for example, is estopped from denying the title of his landlord. The occupant is regarded as having pledged his faith to depart, and will not be permitted to do anything to impair the landlord's title.

8. An estoppel may be effected by deed. This is founded on the idea that the grantor or seller is not permitted to set aside his deed by an inconsistent act. He is, therefore, estopped from denying his title, and, should he acquire one after parting with his own, he could not set this up to defeat it. In other words, after making a conveyance of his property, he is bound by his action, even though not the possessor or owner at that time, but afterward.

The covenants of warranty in a deed raise an estoppel. A defective deed cannot create such an estoppel, for the simple reason that it is not a valid act of transfer.

[1] Hill v. Epley, 31 Pa., 331.

In like manner an ordinary quit-claim deed, conveying all the right, title and interest of a grantor, does not work an estoppel, for the reason that the grantor by his conveyance, does nothing more than convey whatever title he may have in the property. If he possesses none no title is granted, and no estoppel can grow out of the operation.

A man acquires nothing by a deed from one who has neither title nor possession. This is clear enough without further discussion. Some of the states have settled this question by enacting that a title acquired afterward by a grantor passes instantly from him to the grantee. Where such a statute exists there is no room for more questioning.

9. An estoppel binds the representer and all who are in privity with him by relationship or otherwise. A stranger cannot take advantage of an estoppel, nor can he be bound thereby. Again, no one can enforce an estoppel except the person to whom the representation was made, or those who are in privity with him and claim under him.

In order that one may be bound by an estoppel, he must be legally capable of making a valid deed. Minors and married women cannot be bound in this manner.

10. A grantor or seller may reacquire his title by adverse possession, for in doing so he is not acting contrary to his original grant or scale. By thus acquiring a title he is simply acting like one who should subsequently become a purchaser by the simple process of repurchasing.

§ 8. By Possession through Abandonment

1. Land may be thus lost.
2. What is an abandonment.
3. Title cannot be acquired by abandonment.
4. Effect of redelivery and destruction of deed.

1. The ownership of land may be lost by abandonment. When the fact of abandonment is unquestioned no one who may have taken possession can be compelled to relinquish his acquisition. Whether land has been abandoned or not is a question of fact to be ascertained in the same manner as facts usually are.

2. Some limitations to this principle may be given. The mere non-user of a way for a certain time does not work an abandonment of the owner's right to enjoy it. But, if a lessor enters and expels his tenant, who does not choose to re-enter, the rent is gone. If he returns the rent is suspended only during the time of his expulsion. A man may abandon an easement by exchanging it for another.

This principle is not often applied in practice, for people rarely give up intentionally what truly belongs to them. Consequently the efforts to show that the owners of lands have abandoned them are in most cases fruitless, because there is every presumption against such action. A strong case, therefore, is required to perfect an abandonment.

3. Though a title may be lost by abandonment, no one can acquire a title by such action on the part of another. In other words, though a legal title can be

divested or lost by abandonment, no other person can acquire a title by the abandoner's action.

This question sometimes arises when a person has acquired a title by adverse possession, or is seeking to acquire a title by adverse use. It is plain enough that, if one's title is not complete, as we have explained, and he abandons his land, the former owner regains his possession for the reason that his title had not become extinct at the time of the abandonment. But a different principle applies to a title that has become complete by the adverse use of another.

4. On the redelivery of a deed by the grantee, followed by its destruction, the title is revested in the grantor, unless the deed has been recorded. Says the Supreme Court of New Hampshire: "It is well settled in this state that the redelivery, by a grantee to his grantor, of an unrecorded deed, with the intention and for the express purpose of having it cancelled, and of revesting the title to the premises therein described in the grantor, has precisely the effect intended, upon the principal of estoppel." [1]

After recording a deed nothing short of its cancellation has the effect of passing the title back to the grantor.

§ 9. By Legal Process, Attachment and Execution

1. For what causes an attachment may be issued:
   a.—Fraud,
   b.—Fraudulent transfer of property,
   c.—Absconding.

[1] Dodge v. Dodge, 33 N. H., p. 405.

2. Other causes.
3. Cannot be issued against a guardian, executor, etc.
4. What property may be taken:
   a.—Only debtor's property at that time,
   b.—Crops,
   c.—Property in agent's possession,
   d.—Money,
   e.—Goods,
   f.—Property on which a lien exists,
   g.—Property held by an assignee,
   h.—Property held by officers of the law,
   i.—Partner's interest.
5. How land is attached.
6. Exemptions:
   a.—Food and food animals,
   b.—Wearing apparel,
   c.—Household furniture,
   d.—Beasts of husbandry,
   e.—Mechanic's tools,
   f.—Wagons, etc.,
   g.—Homestead.
7. Who can claim exemption.
8. Meaning of householder.
9. Exemption may be waived except wages.
10. Garnishment—Debt must be due.
11. An inhabitant in another state can not be garnished.
12. When foreign corporation can be garnished.
13. Garnishment of municipal corporation.
14. An executor or administrator cannot be.
15. Partnership may be by creditor of a partner.
16. How joint debtors may be garnished.

17. Garnishment of wages.
18. Garnishment of a bank deposit.
19. Bank cannot be garnished for draft secured by bill of lading.
20. Garnishment of public deposit.
21. Securities in bank's safety vault cannot be garnished.
22. Collateral securities may be for excess beyond loan.
23. Deposit covered by a general assignment cannot be garnished.

1. Another way to acquire land as well as other property is to attach it by pursuing the methods prescribed by law ending with its sale in response to the owner's demand for the discharge of his indebtedness, whereby the purchaser acquires a good title. Besides statutes are many general principles; on this double basis rests the law on the subject. The first important question is, for what causes can an attachment be issued?[1]

(*a*) Fraud in contracting a debt is a frequent ground of attachment. A preconceived purpose not to pay for goods furnished on credit, or not to keep an agreement regarding the disposition of property, is a fraud within the meaning generally of the statute. Mere failure, however, to pay a debt at maturity is not a fraud.

(*b*) The fraudulent transfer or disposition of property is another ground of attachment. A transfer or assignment is fraudulent if benefits are reserved

[1] For form of release from judgment see Vol. VI, Appendix, No. 3*p*

to the grantor, or fictitious claims are added. A sale of goods in the usual mode of merchants to customers who come to his store to buy is not a fraudulent disposition of them which will warrant an attachment against a resident debtor.[1] As exempt property is beyond the reach of credits, any disposition thereof by the debtor is legal. This rule was once applied to the owner of a homestead.[2]

The transfer must be voluntary, either absolutely or conditionally, as by a mortgage. When an order of attachment has been issued on an affidavit charging that the debtor is an assignor of property with a fraudulent intent, the attaching creditor must sustain his charge, or his attachment will not be effective. The deed of assignment must clearly show on its face an actual personal interest on the part of the debtor to hinder, delay or defraud his creditors. The mere fact that the deed may be defectively executed is not sufficient to sustain the attachment.[3]

(*c*) Among those against whom attachments are most frequently issued are absconders, or those intending to abscond. Who is such a person within the meaning of the law? One who conceals or absents himself for the express purpose of avoiding the process. He need not leave the state.

2. When the reason for attachment is that the debt was for work and labour performed which the debtor should have immediately paid, an attachment cannot be maintained when the whole transaction shows a

[1] Smith v. Easton, 54 Md., 138.
[2] Davis v. Land, 88 Mo., 436.
[3] McPike v. Atwell, 34 Kan., 142.

mutual account consisting of debits and credits.[1] If the attachment law provide that when the debtor has failed or refused to pay the price or value of any article or thing delivered to him on the delivery thereof, the person suing must show an unconditional contract to pay on delivery and demand therefor.[2]

Unless statutes authorise the proceeding it cannot be begun against a guardian, an executor or administrator, or, in truth, against any trustee in his representative capacity.[3]

4. Let us next inquire what property may be taken? The answer is any property which may be seized and taken by an officer of the law in a legal manner. Nothing whose sale is prohibited by law can be attached—a principle often applied to intoxicating liquors. The sheriff has no power to seize correspondence belonging to the debtor. And if he has authority to seize and take partnership books and also its papers, his power is simply to take and safely keep them. To look into them and take copies would be a gross abuse of power.[4]

(*a*) As the attachment takes effect from the time it is served only such property can be taken as then belonged to the debtor. It covers most kinds of property, land, hay, tools, vessels, promissory notes, locomotive engines, cars, stage coaches with horses, cord-wood and charcoal, property in a newspaper office, wearing apparel, money in the debtor's possession if the officer can seize it without violating the

[1] Morris v. Everly, 19 Colo., 529.
[2] Miller v. Godfrey & Co., 1 Colo. App., 177.
[3] Cox v. Henry, 113 Ga., 259.
[4] Hergman v. Dettlebach, 11 How. Pr., 46.

debtor's personal security, corporate shares of stock. Says Shinn: "Many states permit the attachment of shares of stock in a corporation, to be attached by a creditor of him who holds the legal title to the same even though they may appear upon the books of the company to be owned by another. And some states provide specially for such attachment, but many others hold that such stock is not attachable, because the owner has no legal estate in the property of the corporation. The corporation owns it all."

(*b*) Crops, unless the landlord has a lien on them, may be attached when severed from the land, and generally when they are ripe and ready for harvest. This rule includes tobacco, hay and grain in the straw. When in this condition the officer can enter, cut down, seize and sell the same as personal estate. But hides in a vat for tanning cannot be attached because they cannot be returned in the same condition.[1] To render the attachment valid the crops must be severed from the land and kept in the attaching officer's custody. By a special statute regulating the attachment of property that cannot be manually delivered there may be a levy on an unripe growing crop.[2]

The landlord's interest in a growing crop which the tenant is raising on shares cannot be attached. But "the growing crop of a tenant is in most states subject by the landlord for rent due."[3]

(*c*) Property in an agent's possession may be seized as the principal's wherever found. The officers of a

[1] Cheshire Nat. Bank v. Jewett, 119 Mass. 241.
[2] Reventas v. Green, 57 Col., 254.
[3] I Shinn on Attachment, § 52.

bank, however, with whom a small locked trunk has been deposited in the vault for safe keeping have no authority to open it for the purpose of ascertaining its contents, nor can they be garnished as the trustees of the owner either for the contents of the trunk or for the trunk itself.[1] But property in an agent's possession cannot be attached for his debt.

(*d*) Money due to a federal pensioner is exempt while in possession of the government officer, but no longer. If it has been deposited in the name of the pensioner's wife, it still belongs to him and can be attached by his creditors.

(*e*) A vendor who has parted with the title to property has no attachable interest. Shinn says that merchandise sold on credit and still in the vendor's possession is attachable for his debts, though the vendee may have given notes for the price. Personal property in possession of a fraudulent vendee may be attached by the vendor's creditors because the title has never passed from the vendor. This principle does not apply after he has sold it to an innocent vendee. When personal property is sold on the express condition that the title shall not vest in the purchaser until the agreed price is paid, he has no interest therein which can be attached. A manufactured article still in the manufacturer's possession in an unfinished condition can be attached.[2]

(*f*) "Generally," says Shinn, "chattels subject to a lien cannot, unless by virtue of a special statute, be attached. This is for the protection of the party

[1] Bottom v. Clarke, 7 Cush., 487. [2] 1 Shinn, § 55.

having the lien, and if he waive his objection to the attachment, it does not lie in the mouth of the general owner to complain. Such an attachment is not void, but only voidable at the election of the possessor of the lien."[1]

Property in a common carrier's possession may be attached. As the carrier has a prior lien for his service, the attaching creditor must pay this before he can take the goods away. Again, when the shipper alone has a bill of lading the right of possession is in him and the goods cannot be attached by a creditor of the purchaser. If the consignee is insolvent he will not be allowed to assign the goods to another with instructions to receive them for him and thus defeat the creditors who wish to attach them.[2]

Goods stored in a warehouse are subject to the warehousemen's lien and cannot be attached by the creditors of the owner.[3] More generally, whenever a bailee or keeper of goods has a right to retain them in his possession until his lien is satisfied, they cannot be attached by the bailee's creditors. If he has the right of possession for a specified time, the goods cannot be attached until the expiration of that period. But the bailee's interest in them, if having one, may be attached. And the same rule applies to pledged property.

(*g*) Property held by an assignee under a valid assignment for the benefit of creditors cannot be at-

[1] 1 Shinn, § 50.
[2] Sealfield v. Bell, 14 Mass., 40.
[3] First Nat. Bank v. Hanchett, 126 Ill., 400.

tached or garnished. Says Shinn: "Property assigned for the payment of debts may be attached by a dissenting creditor and be effective as to the surplus after the satisfaction of the demands of the creditors who have not dissented. And when any property is assigned as security for a debt, any residue remaining in the hands of the assignee after the debt is satisfied may be attached, because such an assignment leaves the assignor the owner of the residue. Even a verbal assignment made in good faith, and for a valuable and adequate consideration, will transfer an interest in an account so as to be effective against a subsequent proceeding in garnishment."[1]

(*h*) Personal property in the law's custody cannot be attached. "Money in the hands of an officer cannot be reached, because it does not become the property of the debtor until it is paid over to him. Neither is it a debt due to the creditor in the pending suit rendering the officer liable as a garnishee in attachment. But a balance of money in the hands of a sheriff held, not in his official character, but in his private character, is attachable. And money in the hands of a clerk of the court in his official character is not subject to attachment, but if it be held by him in his private character, it is not exempt from seizure thereunder."[2]

(*i*) The interest of a partner in the firm assets can be seized and sold and, after paying the firm indebtedness, his remaining interest can be taken to satisfy his individual creditors. Shinn says that "there is a small class of cases which holds that the goods of

[1] Shinn, 68.

[2] 1 Shinn, § 7.

the partnership cannot be seized on an execution or attachment for the individual debt of the partner. And the creditor can have only the right of his debts in the surplus after the partnership debts are paid, and that this does not entitle the creditor, nor the officer seizing his interest, to the exclusive possession of the partnership property." [1]

5. With respect to the attachment of land, whatever may be taken by execution, in other language by legal action, to satisfy a debt may be taken for that purpose. What, however, is meant by land in this relation? Shinn says that in California the term embraces every interest in land, but in many states the term has a narrower meaning. For example, a widow's interest in land belonging to her husband is not always included. The attaching officer does not take possession of real estate as he does personal property, but makes a proper written notice in the place where the record of its title is preserved.

In all cases an attaching creditor gets no greater rights than the debtor had at the time of the seizure of his property, therefore if he cannot take possession of it, his creditor cannot.[2]

6. We now come to property exempt from attachment, which rests entirely on statute. The tendency is to increase exemptions; and the statutes granting them are liberally construed.

(*a*) The statutes of most states specifically exempt articles of food, also food animals. A statute exempting a quantity of wheat does not exempt a barrel of

[1] Ibid, § 80.

[2] Adoue v. Seligson, 54 Tex., 593.

flour purchased by the debtor; a statute exempting one hog and the pork thereof, does not cover both the hog and the pork of another.

(*b*) Another exemption is wearing apparel, which includes suitable apparel for labour with an extra suit for Sunday and an overcoat.

(*c*) Household furniture is another exemption, also that used by a lawyer in his office. In Connecticut a widow and daughter, who had kept a boarding house, took a furnished house in New York, intending to return and resume business. In the meantime she stored her furniture, which was attached. The court held (1) that the furniture, if otherwise exempt, was not attachable by storing it, (2) that it was not exempt as a necessity for the use of her boarders, (3) that the term family was not limited to the mother and daughter, but, as she was keeping boarders, might properly include a servant or a dependent sister who was living with the family, (4) that in determining what was necessary household furniture her occupation might properly be considered; if more was required for her personal use because she kept boarders an additional bureau, for example, was covered by the statute.[1] A cooking stove is exempt.

The officer who attaches household furniture must leave articles amounting in the aggregate to the statutory value. "And where articles of household furniture which are exempt from attachment are intermingled with other similar articles not so exempt in the house of the owner this is not such a confu-

[1] Wood v. Dayton, 40 Conn., 293.

sion of goods as will justify an officer in attaching all of them on failure of the owner to claim any of the articles as exempt."[1]

(*d*) Beasts of husbandry and domestic animals which constitute the support of the debtor or his family are exempted in many states. An animal need not be in actual use; if kept with the honest intention of using it, the law is observed. A debtor who refuses to elect whether he will retain a horse or pair of oxen as the exempt team can not complain because the oxen were attached and sold. Likewise if a cow is exempt the debtor cannot complain about the officer's selection if he have more than one. And if the debtor owns neither oxen nor horses a colt that he may have is exempt.

(*e*) The statutes in all the states probably exempt the tools of a mechanic used in his trade. Shinn says that "working tools necessary for his usual occupation should be construed to include not only all tools which are indispenably necessary to the mechanic, or even such as are in use by individuals of the same craft, but also such as the mechanic has adopted to ease and diminish his labour, and not only his working tools, but such as he used and has set apart for the advantageous prosecution of his business."[2] And if one is engaged in two branches of business he may select tools used in both trades, but the value of all must not exceed the exempted value fixed by the statute.[3] The debtor must be a mechanic as dis-

[1] 1 Shinn, § 100.
[2] Shinn, § 103.
[3] Barker v. Willis, 123 Mass., 194.

tinguished from a manufacturer. But in Massachusetts machines of a simple construction, moved by the hand or foot and used in the manufacture of boots, are exempt from attachment even though the owner employed a number of men under him in carrying on his businss by whom the machines are generally used.[1] Lastly, the temporary suspension of a mechanic's exercise of his trade does not render his tools liable to attachment.

(*f*) To the foregoing exemptions others will now be given. A barber's chair and foot rest, presses, vats and knives used in cheese-making, a grindstone used on a farm, a sled for drawing timber to market, a shovel and other tools used by a debtor in tilling his land, a violin used by a musician; apparatus used by a teacher for teaching, the cart or truck of a peddler, the wagon, horse and harness of a physician if needed by him in practising his profession, but not a wagon used for convenience or pleasure, nor a wagon with patent couplings attached used by the owner in selling patent couplings, nor is the stock of goods, scales and measures, horses, wagon, and harness of a country shop keeper.

(*g*) Most states provide for a "homestead" exemption of land with a fixed valuation. This land is for the debtor and his family. A levy by attachment on land previous to making a home of it will be effective. But if two parcels of land are apart, though used for the same common purpose, both are exempt.[2] Building materials that are to be used for repairing

[1] Daniels v. Haywards, 5 Allen, 43.
[2] Brooks v. Chatham, 57 Tex., 31.

the homesteader's dwelling house which have been deposited on his land are also exempt.

Again, if the homestead has been changed into money which is kept as a separate homestead fund, it cannot be attached, even when deposited in a bank. Money paid for a right of way over a homestead by a railway company is exempt. But a homestead does not extend to new land exchanged for the old. Insurance money received from the burning of the house, barn or other building is exempt for a reasonable time.[1]

7. Again, the question has been raised, who can claim the exemption? The head of a family, and if the husband is temporarily absent, the wife may claim the exemption for him. A married woman abandoned by her husband, but temporarily supporting her child, is the head of a family. The family of an absconding debtor only also benefit by the exemption.[2]

8. The term householder is by some statutes used in the same sense, as "head of family" in others. A householder is one on whom rests the duty of supporting the members of his family or household. The head of the family also must reside with the members, for a statute exempting property for the use of every family in the state does not cover the property of one having a family in another state.[3]

9. Lastly, the debtor may waive or give up his exemption by a great variety of acts. But the exemption of his wages from attachment and exemption can-

[1] Cooney v. Cooney, 65 Barb., 524.
[2] Shinn, § 110; Bonnel v. Dunn, 29 N. J. Law, 435.
[3] Allen v. Manasse, 4 Ala., 554.

not be waived.[2] The reason is, the exemption is made for the benefit of his family.

10. Garnishment is another form of attachment in which "the garnishee is notified or warned not to pay the money or other effects in his possession to the owner, but to hold them until the court shall decide whether they ought to be paid by him or to some other person The garnishee, therefore, is a stockholder or custodian of the funds or property in his hands which he must hold under the proper disposition of the court. He has no pecuniary interest in the matter, no costs to pay and none to save. His business is to suffer the law to have its course between the litigants, and he is not permitted to do anything to change his position toward either. He is only bound to disclose the truth respecting others." The proceeding is founded wholly on statute.

Some statutes require that the debt must be due and payable at the present time in order that it may be made the subject of a proceeding in garnishment, while others permit a debt which is to become due in the future to be so made liable, but it is a universal requirement that it must be an absolute existing debt, even though the period of its payment may not have arrived.[1] It therefore follows that a contingent or uncertain debt cannot be garnished.

11. An inhabitant in another state is not chargeable as a garnishee, if he has come for a temporary purpose. When, however, the garnishee is a resident of the state, the fact that the principal debtor is a

[1] Shinn, § 114. [2] Shinn § 847.

non-resident will not affect the validity of the attachment, because attachments are permitted against non-resident debtors. If the garnishee and the principal debtor both reside without the state, and the debt is payable elsewhere, the garnishment will not be effective. A corporation may be garnished, and if doing business in another state it may be garnished there whenever it may be sued there like any other corporation. A foreign corporation which is casually within the state by the presence of an officer cannot be garnished.

12. Again, no foreign corporation can be made liable as a garnishee so long as the amount of its indebtedness is uncertain. This rule is often applied to insurance companies which cannot be garnished until the amount of the loss has been fixed.[1] Nor can the money of a corporation set aside as a sinking fund for the payment of defined debts, of bonds pledged as collateral security, be garnished. Nor can a corporation be held liable as a garnishee for stock owned by the principal debtor. This is based on the reason that the stock is not a debt due to him from the corporation. By the statutes of many states, however, shares of corporate stock may be attached. "Regarding the possibility of holding a subscriber for stock in the corporation as a garnishee when one has subscribed for stock, and the money for the price is due to the corporation at a fixed time the subscriber may be garnished by a creditor of the corporation."[2]

13. Public policy prevents the application of the

[1] Bucklin v. Powell, 60 N. H., 10.

[2] 2 Shinn, § 870.

law of garnishment to municipal corporations, but in some places it can be done. "The general rule," says Shinn, "that a municipal corporation may not be held as a garnishee for a debt due by it to a third person, has been applied where it was sought to subject an unpaid balance due to contractors and material men on school houses and other public buildings for grading and paving and for other contracts of employment. The rule has been more frequently applied, however, where it has been sought to secure parts of the salary due from a municipal corporation to its officers. By an application of the rule, the salaries or earnings of teachers of public schools cannot be secured by process of garnishment seized upon the corporation or board owing them. In the same manner fees due to jurors have been beyond the reach of garnishment process."[1] "Neither the board of trustees or directors, nor the treasurer of the board, can be made a garnishee to secure the application of the wages of a teacher to satisfy his debts.[2] A public officer is beyond the reach of garnishment while he holds his funds in his official capacity. Money or property which has been obtained by an officer on execution or other legal process is in custody of the law and cannot be taken by another writ while it is thus held." The rule is very broad and applies to almost every kind of offices.

14. An executor or administrator is not by the common law liable officially to garnishment in a suit by a creditor of the estate, nor by a legatee or distributee. Nor is he an agent, factor, attorney, or trustee

[1] Ibid, § 874.
[2] Trustees of Schools v. Latman, 13 Ill., 27.

of a creditor, because he derives all his authority from a different source. By statute in many states they may be garnished by creditors, legatees or distributees. A guardian is generally governed by the same rule as an executor or administrator.

15. A creditor by garnishment, may secure the money or property belonging to a partnership which is in the possession or control of its debtor. The individual members are treated as one individual, and the partnership creditors are liable in the same manner as an individual's creditors.

16. When a debt is owing by several persons jointly they must all be joined as garnishees, for the process will not generally reach a debt due from joint debtors by service on one alone. "If two or more persons are not jointly indebted to the principal defendant they cannot generally be jointly charged as garnishees in one writ of garnishment. If several are distinctly indebted and have distinct interests they must be distinctly charged, for they cannot be jointly charged as having jointly in their hands the effects of the principal debtor." [1]

17. With respect to wages, as those of a minor belong to the father, they may be secured by garnishment; if a minor has had his time given to him by his father, his earnings cannot be garnished for his father's indebtedness. The garnishing of an employee's wages is a thing of common occurrence, which may be done unless exempted by statute. In many states a specified sum is exempted. They must have been earned and

[1] 2 Shinn, § 902.

have become payable before they can be garnished, consequently wages paid in advance cannot be garnished, though in some states the garnishing of future earnings is authorised by statute.[1] Again, when an employer has a lien on the wages of an employee which by agreement is to be paid from his earnings, his wages cannot be garnished until this is satisfied.[2] And if a contractor does not complete his contract, whatever he may have earned cannot be garnished. A labourer when employed may lawfully assign his future earnings to another creditor if the employer will agree to pay the wages accordingly. Of course, the assignment must be without fraud and in all cases must conform to the statute.[3] When the wages are payable in non-negotiable orders or certificates, they may be sold by the employee before they are received; and any acceptance of the assignee to whom they are to be paid will relieve the payor from liability to garnishment. And any surplus over the amount assigned by the accepted order is liable to garnishment of the employer by the labourer's creditor.[4]

The wages of a labourer which are exempted by statute are such only as are earned by the hands and labour of the individual himself, and of his family under his direction, and do not extend to what is earned by him as a contractor or received by him as the superintendent or master of other labourers. Therefore a master carpenter who supervises the labour of the

[1] 2 Shinn, § 938.
[2] Thorne v. Matthews, 5 Cush., 544.
[3] For form of assignment see Vol. VI, Appendix, No. 14.
[4] Macomber v. Doane, 84 Mass., 541.

hands employed by him in building a house is not exempt, neither is the boss of a department who employs and discharges the hands, nor is the conductor of a railway train who has full charge of the conduct and management of the train; nor is a blacksmith who is the proprietor of the shop. On the other hand the wages of a forwarding clerk of a railway company are exempt, also those of a locomotive engineer, of a school teacher, of a miner, who himself works in a coal mine at so much per ton although he has charge of a chamber with two hands under him, of seamen except in Massachusetts. Even in that state the voyage must be completed before their wages can be garnished.

18. A depositor's creditor can acquire a lien to his deposit by garnishment. The bank must respect the process and can neither apply the fund attached to the payment of any debt from the depositor to itself nor to anyone else. Nor is his creditor, whether insolvent or otherwise at the time of the attachment, of any concern to the bank. Whenever, therefore, the institution is liable to the depositor his creditor can acquire a lien on his deposit by attaching it. Furthermore, having once acquired a lien, by no device of the debtor or bank can it be destroyed or impaired.

As the person who makes the deposit is usually not important, a deposit made by one for the benefit of another can be attached by a creditor of the depositor. For the same reason the source of the money is not important if at the time of making the

deposit it belonged to the depositor. Borrowed money, therefore, can be attached like any other.

While a deposit belonging to the depositor is subject to attachment, a check, draft, note, or other instrument deposited by him that has not been collected nor credited as cash with the right to draw against it cannot be attached.

As the depositor himself would have no claim against the bank until its collection, surely no creditor of his would have a superior claim. For the same reason a creditor cannot attach a check drawn on the same bank, or on another, for which a credit has not been given to the depositor. A different rule, however, applies to a check that has been certified, for this is essentially money and may be attached by the depositor's creditor.[1]

19. Again, a bank that cashes drafts accompanied by bills of lading becomes the owner of the several instruments and goods covered by them, which cannot be attached by any creditor of the drawer. The bank thereby acquires a special property in the goods which it retains until the draft is accepted or paid.

20. A deposit of a public fund in the officer's individual name may be garnished and taken for his debt. No proof appearing of its public character to justify the bank in paying the money to the attaching creditor, it must act honestly and without knowledge of its true ownership. When thus acting its course is safe from attack by the depositor, his successor or any other interested party.

[1] 2 Bolles on Modern Banking, p. 778.

21. Money and other securities stored in the vaults of safety deposit companies cannot be taken save by special statute, because they are not debts in any sense due from these institutions. The safety deposit companies are purely bailees or keepers.

22. Collateral securities held by a bank as security for a loan may be attached subject to its rights and after the proper sale of them, should a surplus remain, this may be taken by the attaching creditor, but the bank's rights are paramount. A bank, therefore, that discounts a draft secured by a bill of lading acquires a title to the merchandise which is superior to that of any attaching creditor of the shipper.

23. A deposit that has been assigned in the general assignment of the owner cannot be garnished by one of his creditors.

§ 10. By Tenant or Occupant for Life

1. Mode of creating an estate for life.
2. For whom it is created.
3. Rights and duties of life-owner:
   - *a.*—Improvements,
   - *b.*—Payment of interest on mortgages,
   - *c.*—Taxes.
4. Relation between life-tenant and reversioner:
   - *a.*—Rents,
   - *b.*—Crops,
   - *c.*—Effect of purchase of outstanding title by life-occupant,
   - *d.*—Sale of interest by life-occupant,
   - *e.*—Valuation of life-occupant's interest.

5. Waste.
6. How land must be improved:

   a.—Repairs,
   b.—Insurance.

7. Division of income from stock between life-occupant and reversioner.
8. Remedies for wrongs committed by life-owner.

1. Ownership for life is often created by will, the testator giving the use of his land to a son during his lifetime, and, after his death, then to the son's child or some other person. This is the most usual way in which estates for life are created. They are very common, though perhaps less so than formerly. The old system of entails, as they are called, which still prevails in England whereby different interests in land are carved out for the purpose of perpetuating the family name and grandeur, has never received much countenance in America. Furthermore, the wealth invested in land is forming a constantly diminishing portion of the entire wealth of the country, and consequently there is a weaker desire to entail or perpetuate interests in land than formerly, when it constituted by far the largest part of a person's wealth.

2. Nevertheless, estates for life are constantly created by will for the especial benefit of the children of the testator; and the principal modern questions that arise relate to the mode of using the land thus inherited. Besides these are other questions pertaining to the validity of such estates. As the answers to the second series of questions depend largely on the

construction of the instrument creating them, they need not be considered here.

3. What are the rights and duties of an owner of a life-estate?

(*a*) For improvements made on the land he cannot claim compensation from the person who is to receive it after him, usually called the reversioner or remainder-man. On the other hand, he is under no obligation to do more than to keep the premises in repair. He may complete, at the expense of the testator's estate, a mansion-house which was begun by the testator. The expense of putting the house into a tenantable condition is a charge that must be borne by the estate of the testator, not by the person who is to become the possessor for life. But, having once come into possession, after the completion of repairs, it is his duty to maintain them afterward.

(*b*) Another important duty is to pay the interest on any mortgage or other encumbrance that may exist on the life-estate. He is not required to pay the principal, however, and should he be obliged to do so in order to retain his life-estate, he would become a creditor of the testator's estate. On the other hand, the voluntary purchase of a mortgage on the estate, the law regards as done for the benefit of the reversioner as well as himself, and the amount must be divided in some equitable manner between them.

(*c*) With respect to taxes, the life-occupant must pay them, as they are an annual charge and do not affect the reversioner. An assessment for permanent benefits is like a mortgage, and, as the land is thereby

permanently increased in value, the expense must be borne by both the possessor for life and the reversioner. Should the assessment call for the payment of a given sum annually, like the interest of a mortgage, it would be the duty of the life-owner to pay the annual sum accruing, and the remainder-man or reversioner the principal.

The rule, perhaps, is without qualification that the occupant for life must pay all the taxes assessed on the estate. If, therefore, he neglects to do this, becomes bankrupt, and a receiver of his estate is appointed, he may take so much of the rent accruing from the use of the land as may be needed to pay the taxes due to the public. In Ohio a life-occupant who fails to pay the taxes forfeits the estate to the reversioner or remainder-man. This effect of his neglect in that state is by virtue of a statute.

The life-occupant cannot take advantage of his own wrong in neglecting to pay taxes, to buy property at a tax sale and thus defeat the estate of a remainder-man or reversioner. As between these persons, the purchase simply has the effect of discharging the taxes. Furthermore, though the life-estate and remainder be destroyed by a valid tax sale to a stranger, the remainder-man still has a claim against the life-occupant for his neglect to perform his duty. On the other hand, the remainder-man may purchase at a tax sale and acquire a good title against the life-occupant for the reason that he owed no duty to him to pay the demands of the state.

4. The position of the life-occupant is deemed to be

opposed to his reversioner. Consequently, his disposition, for any reason, does not affect the rights of the reversioner. He may enter or recover possession within the period fixed by law after the death of the life-occupant, without regard to the length of time he may have been dispossessed. Again, one who enters on the land of the life-occupant, by virtue of an agreement with him, and remains there after his death ,is transformed into a trespasser, for the life-occupant can do no act which affects the title or interests of the reversioner.

(*a*) All the income or profits that accrue while the life-estate endures belong to the life-occupant, and pass on his death to his representatives unless he has disposed of them during his lifetime. This includes the natural increase in live stock, interest on money, rents; but should the life-occupant lease the land and die before its expiration, the entire rent would belong to the reversioner. This is the rule of common law, founded on the principle that the rent cannot be divided. This rule has given rise to much controversy, and is so contrary to justice that, in many states, it has been set aside by statutory or judicial action. Therefore it may be said that, in most states the rent may be apportioned or divided in a case of that kind between the legal representative[1] of the life-occupant and the reversioner. In a few states, however, the old rule still prevails.

(*b*) Another question growing out of the life-occupancy of land is, who are entitled to the crops planted

[1] By legal representative is meant his executor or administrator.

before and maturing after the termination of the occupant's estate? The general principle is that annual crops belong to the representative of the life-occupant but, in some states, they descend to his heirs. In other language, they go to the executor or administrator because they are a part of the occupant's personal estate, and do not belong to his heirs. The right to them carries also the right of entering the land, cultivating the crops, and harvesting them when they are ripe.

Another question closely related to this is, what crops are annual within the meaning of this rule? It may seem to the reader as if such a question is too plain for discussion, but an attempt to answer it reveals difficulties. Among the annual crops are corn, beans, hemp, flax, melons, potatoes, grasses, and the like, which are annually renewed. But what shall we say of crops that are grown on permanent roots? The law says that these, too, may be included; also turpentine taken from trees, because the produce is gathered annually. On the other hand, clover and other grasses which endure for more than a year are not included, nor the fruits of trees growing on the land, even though planted by the life-occupant. To this rule an exception is made of trees and shrubs planted simply for sale by gardeners and nurserymen who are life-occupants, as this is their sole object in planting them.

The right to annual crops is not an incident simply to life-occupants alone, but to the occupants of all estates of uncertain duration. If a tenant, knowing that his estate will end before he can gather his crops,

and thus knowing plants them, his folly is his own, and his successor will be the gainer.

Again, the estate must be determined by the death of the occupant or by some act other than his own, for, by a voluntary abandonment of the land, he forfeits his right to claim the crops growing thereon. Thus, should a doweress marry and lose her right of dower, the crops growing on her land would also be lost.

This right to the crops is not limited to the original occupant for life, unless he is restricted from underletting his estate. His assignee or grantee possesses the same rights as himself, and in some cases, may claim the crops when the original possessor could not. Thus, it is said that, if a widow should, during widow-hood, underlet her land and then marry, thereby losing her own right to the annual crops, her tenant would not, because he had kept within the law.

(*c*) If the occupant purchases an outstanding title or interest, the law requires him to share the benefit with the remainder-man or reversioner, if the latter will contribute his proportion of the cost of purchase. If the life-occupant pays more than his proportion he becomes a creditor of the estate for the excess.[1]

As the life-occupant is entitled to its possession while the estate continues, he cannot be compelled to sell his interest, or to accept money for the use of the property.[2]

(*d*) A life-occupant may sell his interest, but cannot by so doing defeat in any way the rights of the

[1] Whitney v. Salter, 1 Minn., 103.
[2] Armiger v. Reitz, 91 Md., 334.

remainder-man. But the latter may, by ratifying an unlawful sale of his interest, render it valid.

In some states land may be sold under order of the court by statute for re-investment, or to serve more perfectly the interest of minors, and other parties. This can also be done when all the parties interested are properly represented and desire its sale.

(*e*) Sometimes the relations of parties requires that a present value be put on an estate for life. The English rule, that an estate for life is equal in value to one-third of the entire estate, has been adopted in some states. But a closed and more general rule is to value the life-estate by the probable duration of the owner's life based on the tables of life expectancy and also the condition of his health, and other matters properly affecting each case.

5. Another important principle governing an estate for life is, no waste can be committed that will essentially injure or impair the future estate. This principle, which is easy enough to state, is very difficult to execute. Hundreds of cases of this nature have arisen, nor do we suppose the end of them will soon come.

Waste may be either voluntary or permissive. The first is some act done which injures the inheritance; the other is the omission of some duty yielding a similar result. To tear down a house is voluntary waste; to suffer it to decay is permissive.

The application of this rule to trees is sometimes difficult. The common law rule is that to fell timber, or to cause its decay, is waste. But what kind of trees are to be regarded as timber-trees? Some of

them are clearly defined, like oak, ash and elm; others, like willow, are just as clearly not within the category; while others are in the doubtful list. An eminent author, whom we have before cited, says that, in this country, the question may be answered by ascertaining the standard or practice of a prudent farmer. What would he do with his own land, having regard to it as an inheritance?[1]

This question has often arisen in states where the lands are covered with forests and cannot be cultivated until they are cleared of the timber. In these the question turns on the custom of farmers and on the value of the timber; whether, by clearing the lands, so much timber has been cut as to injure the inheritance.

Wood cut by a life-occupant in clearing the land belongs to him—and as an incident he may sell it; but he he cannot cut wood expressly for the purpose of sale. Again, when sued for cutting and selling timber he cannot make a counter-claim for improvements on the premises at another time; but he can remove cut or decayed timber, to clear the land and give young trees a chance to grow.

Sometimes timber is blown down; when this happens the life-occupant is entitled to a quantity for firewood. To carry off trees that have been blown down is to render himself liable for their value.

Another kind of waste consists in opening gravel-pits and selling gravel or clay for brick-making. An occupant for life can neither take clay nor cut wood

[1] 1 Washburn, § 274, p. 130.

for the purpose of making bricks for sale, unless this has been the usual mode of improving the land. In such a case he would have the right to continue to use it like previous occupants.

For the same reason he cannot search the land for mines, and, after their discovery, open them and proceed to work them. But mines already opened on taking the estate he may continue to work, even though he should exhaust them, for, in so doing he is simply taking the profits of the soil. Furthermore, he would not be guilty of waste in opening new shafts or pits following the same vein or veins as those already opened at the time of taking possession. The general principle, therefore, is, he can improve the land in the same manner as his predecessor, but cannot impose new burdens or new uses; and all improvements that he may have made on the land in working mines and in other ways belong to the reversioner whenever he takes possession.

6. The life-occupant must improve the land in the manner required by good husbandry, and any violation of this rule is waste. This phrase is a relative expression varying greatly in different countries and places. A few illustrations may be given. For example, it would be waste to let pasture lands be overgrown with brush, to impoverish fields by constant tillings, to remove manure made in the ordinary course of husbandry, to suffer a bank to become weak or broken whereby water will overflow. Once it was said that adapting a building to a new purpose, or converting two chambers in a house into one, would be waste.

This rule has been displaced by the more rational test, will the act essentially injure the reversioner's inheritance? In a well-considered case it was remarked that the life-occupant has no right to pull down valuable buildings, or to make improvements or alterations, which would materially or permanently injure or change the nature of the property. On the other hand, it cannot be waste to make new erections which can be removed at the end of the term without much inconvenience, leaving the property in the same situation as before.

A life-occupant who takes possession of a ruinous house cannot be made responsible if he suffer it to remain so; but he may repair it if there be timber on the land fit for the purpose. It would be double waste to suffer a house to go to decay and then cut timber to make repairs.

(*a*) A life-occupant must make the repairs needful to prevent waste unless relieved by express direction or agreement. What these are may be clearly defined in some cases, but not in all. He is not required to expend large sums for this purpose, and especially for repairs to buildings untenantable at the time he took possession, or afterward destroyed by act of God or by an accidental fire not caused by his negligence. But he may repair an untenantable house.

A life-occupant cannot tear down a house even if it be unfit for use, or the object be to erect a better building in its place. Nor can it be removed unless it is not affixed in a permanent manner to the land.

Should the life-occupant not make needful repairs within a reasonable time after due notice from the remainder-man, the latter may make them and recover the amount from the life-occupant.

A life-occupant cannot create a charge against the remainder-man for the money expended in permanent improvements however much they may add to the value of the estate, for they must be deemed to have been made for his own benefit. Consequently they pass on his death to the remainder-man who takes them without any liability therefor.[1]

(*b*) The life-occupant is not required to keep the premises insured for the benefit of the remainder-man or reversioner. And if he does insure his life interest without intending to protect the remainder-man, the latter is not entitled to the excess if there be any over the value of the life estate.[2] But if a building is merely injured by fire, both the life-occupant and owner of the reversion are entitled to have the insurance applied to the repair of the building.[3]

7. The ways of dividing the income from corporate stock between the life-occupant and the remainder-man, are not the same in every state. The four principal rules or ways may be given.

First, cash dividends go to the life-tenant or occupant and stock dividends to the remainder-man. This is often called the Massachusetts rule. "A trustee needs some plain rule to guide him," so the court in that state has said, as if a clear pathway for him was

[1] Chilvers v. Race, 196 Ill., 71, 82.
[2] Spalding v. Miller, 103 Ky., 405.
[3] Brough v. Higgins, 2 Gratt., 408.

of more importance than a just division of the income between the parties entitled to it.

Second, another rule is, all dividends declared out of earnings, whether in cash or stock go to the life-occupant, while the division of property or its proceeds from other sources than earnings goes to the remainder-man. This rule has regard for the substance rather than the form of things. When all the earnings thus divided have accumulated since the testator's death the rule is just and reasonable.

Third, in determining the character of a dividend, whether it is a real division of earnings or not, some courts hold that the action of directors is conclusive, while other courts have seen with greater clearness that a board of directors cannot by any resolutions or declarations or use of the money divest it of its real character, and that any attempt to do so should be prevented by proper legal action.

Fourth, in many cases unusual or extraordinary dividends declared are composed in part at least of the profits or property existing at the time of the testator's death. In such cases the portion earned or existing before his death goes to the remainder-man, and the other portion to the life occupant. This rule is expanding, though it has not been adopted in any state. It is true that so long as directors act in good faith in making accumulations the court may not listen to the complaint of a life-tenant who desires a division, but when a dividend has been declared, whether in cash or stock, it would not be difficult for the court in many cases to determine whether it had been declared out

of earnings or other property; and, if out of earnings, what portion had accumulated since the testator's death.

8. There are two remedies against the life-occupant who is guilty of committing waste, which are worthy of brief mention. One is an action to recover damages for the injury; the other, and more common, remedy is an injunction to prevent him from committing waste. If, for example, the occupant is about to cut timber or open mines, or do any other thing which will injure the inheritance, the reversioner or remainder-man can apply to a proper tribunal to restrain him from doing these things. This is the common and more effective remedy, but the occupant may commit a serious injury before the remainder-man's discovery. While the reversioner is journeying around the world the life-occupant may have improved his opportunity to despoil the other of his inheritance. When this has happened the only remedy left to the reversioner is to recover damage for the injury.

§ 11. By Mortgagor and Mortgagee

1. What is a mortgage.
2. Mortgagor need not be absolute owner.
3. Full terms of agreement are usually expressed.
4. When absolute deed is only a mortgage.
5. Mortgage for future advances and crops.
6. Mortgage of after-acquired property.
7. Mortgagor's remaining interest may be subject to levy.

8. Distinction between mortgage and right to purchase.
9. Secret agreements:
   (*a*) Between immediate parties,
   (*b*) Nature of mortgage cannot be changed by another simultaneous agreement,
   (*c*) Can be by subsequent agreement.
10. Relationship of simultaneous lienors.
11. Mortgage with power of sale.
12. Mortgagee cannot purchase at his own sale and extinguish equity of redemption.
13. He can purchase at officer's sale.
14. Deed of trust:
   (*a*) Nature and terms,
   (*b*) May be made to secure future advances.
15. Creation of mortgage by depositing title deeds.
16. Vendor may have lien:
   (*a*) Who is affected,
   (*b*) On what theory it rests,
   (*c*) Will prevail against assignment for benefit of creditors,
   (*d*) Notice of lien,
   (*e*) Part payment by vendee,
   (*f*) Does not arise in favour of third party who pays purchase money,
   (*g*) Assignment of vendor's debt is an assignment of the lien,
   (*h*) Sale of land to satisfy vendor's lien.
17. Equity of redemption may be mortgaged.
18. No mortgage without a debt.

19. Different theories concerning operation of mortgage:
    (*a*) By one, estate belongs to mortgagee,
    (*b*) By other, estate belongs to mortgagor.
20. Changes in form of indebtedness do not affect debt.
21. Both may insure premises.
22. Mortgagee's remedy against mortgagor for misuse of the estate.
23. Mortgagee, by purchasing equity of redemption, acquires entire interest.
24. Mortgage to secure different persons and debts.
25. Mortgage by different persons of distinct land to secure joint debt.
26. Mortgages take effect in order of registration.
27. How far a devise of land includes a mortgage.
28. Mortgagee's interest descends to his heirs.
29. When mortgagor can claim damages of public for taking his property.
30. How a mortgage affects a policy of insurance.
31. Mortgagor cannot be charged with rent.
32. Mortgagor cannot deny mortgagee's title.
33. Who can redeem a mortgage estate.
34. Entire mortgage must be paid to have that effect.
35. Sale of land extinguishes the lien.
36. Redemption by mortgagor.
37. Redemption by one of several interested persons.
38. Usury as a means of defeating a mortgage.
39. How tender must be made in proceedings to redeem.
40. Mortgagee's presumption of ownership from possession.

41. Mortgagor's presumption of payment from possession.
42. Effect of payment by a volunteer.
43. Payment by a surety.
44. How payment may be proved.
45. Usually mortgagee gives deed of release.
46. On mortgagor's death his heirs may call on his administrator to pay.
47. When the heirs cannot do this.
48. Rights to purchase of holder of equity of redemption.
49. Courts will not thus apply estate of insolvent mortgagor.
50. Payment of joint debt by one. His right to contribution.
51. Rights of assignee of one of several parcels to contribution.
52. Liability of mortgagor of several parcels, who afterward sells one, to pay entire debt.
52. Rights of different creditors in the same property.
54. Mortgagor's rights to charge for personal service.
55. Accounting in action to redeem.
56. Action of foreclosure.
57. Effect of decree.
58. Mortgagee may assign mortgage.
59. Assignment must be in writing and recorded.
60. Mortgagor can assign. Rights and liabilities of respective assignees.
61. Rights of assignees of several debts secured by same mortgage.

62. After mortgagee's assignment he can release nothing.
63. Law of place of assignment governs.
64. Assignment of mortgage without the debt.

1. Another form of ownership is by mortgage. This is a lien on land to secure the performance of some obligation, usually the payment of money. After this has been performed the mortgagee's interest in the land ceases, and the mortgagor or owner is reinvested with as perfect right thereto as though he had never made the agreement. Usually, the mortgagor remains in possession of the land until he fails to execute his agreement. When this happens the right and the title of the mortgagee to the land become perfected either immediately or within a given period, as will be hereafter shown.[1]

2. Any person who has legal capacity to act for himself may make a mortgage of his property, or may authorise another to do this for him. By statute in many states guardians or others acting for minors, insane or other persons legally incapable to act for themselves, may be authorised by the courts to make mortgages for their wards.

3. In a mortgage it is usual to express the full terms of the agreement. Yet this need not be done. The defeasance, as it is called, or terms for repaying the money, and closing the entire transaction, may be in a separate instrument. Usually the entire contract is put in a single deed or conveyance, which is re-

[1] For form of mortgage deed, see Vol. VI, Appendix, No. 2.

corded. In some states—New York for example—two instruments are given—a bond and a mortgage. This is a very elaborate mode of expressing the obligation; a simpler form is generally employed.[1]

4. A conveyance intended, at the time of its execution, to be a security for the payment of money, is called a mortgage. Washburn says: "Whenever there is, in fact, an advance of money to be returned within a specified time, upon the security of an absolute conveyance, the law converts it into a mortgage, whatever may be the form adopted, or whatever may have been the understanding between the parties."[2]

5. The question, perhaps, is still open whether a mortgage can be made for further advances or liabilities. The rule may be thus stated: A mortgagee who has agreed to furnish advances under all circumstances, and who would be liable if not fulfilling his agreement, takes precedence of another mortgage, made after the execution of the first, for the amount advanced both before and after the execution of the latter. Again, a mortgagee who makes voluntary advances after another mortgage, his refusal to make them not constituting a breach of his agreement, will have priority only for the amounts advanced before the execution of the second mortgage.

Lastly, a mortgage to secure future advances is not valid against subsequent encumbrances who may make advances without any notice, except that given by the record, of advances actually made. In other words, a mortgage containing a stipulation of this

[1] For form of bond see Vol. VI, Appendix, No. 17.
[2] 2 Real Property, § 980, p. 34.

kind is not regarded as a notice to a subsequent mortgagee except so far as the record discloses an actual advance; nor does the law require a subsequent mortgagee in good faith to make any inquiry concerning what action has been taken by the parties to a preceding instrument in the way of future advances.

A valid mortgage of a crop before it is raised may be made by an owner or lessee of land, even though the seed has not been sown or planted. The lien attaches as soon as the crop is gathered and may be enforced against purchasers who have proper notice. A mortgage of crops by one who is cultivating land on shares covers only his share.

The mortgagor, until foreclosure or possession by the mortgagee, is entitled to the emblements, or profits of the land that is sown, and when they are severed he need not therefore account for them. But if the mortgagee has the legal title and right of possession a different rule prevails. Trees and shrubs planted in a nursery for the purpose of cultivation until they are fit to be sold and transplanted pass by the mortgage, and the mortgagee can remove them. But if he had notice that the trees belonged to a firm of which the mortgagor was a member, the firm has the right of removal.

6. After-acquired property, buildings, improvements, fixtures, become a part of the land and are acquired by the mortgagee. What are fixtures as between a mortgagor and a mortgagee is a question largely of intention, as in other relationships that have already been considered. Washburn says that the principle

is very broad, including trade-fixtures attached to buildings by bolts and screws, although they may be removed without injury to the freehold. It also applies to whatever is added to a railroad under mortgage, and to all improvements made on mortgaged premises. Neither the mortgagor nor his grantee can claim an allowance for the same. "In the more recent cases the intention with which a chattel is attached to the realty has become more and more the decisive test whether or not the chattel has become part of the realty. Such intention may be inferred from circumstances." [1]

7. A levy may be made on the mortgagor's estate or interest in the land still remaining, and afterward it may be sold to satisfy the claim of any other creditor.

8. A distinction exists between a mortgage and a right to purchase the land by the debtor. If the transaction is merely a right to repurchase, on the debtor's failure to comply strictly with the agreement all his right to the estate is gone. If the transaction is a mortgage then the mortgagor or debtor has an equity of redemption still inheriting in him to obtain the land. Whether the transaction is the one thing or the other is a question of intention that must be determined by the cricumstances in every case. The courts are always inclined to regard the transaction as a mortgage.

Nor can oral evidence be interposed to show that a deed which appears to be a mortgage was intended

[1] 1 Jones on Mortgages, § 429.

as an absolute conveyance. While this rule prevails everywhere, the converse proposition is not true, that a deed, absolute on its face, cannot be changed by evidence showing that the parties intended to create a mortgage. Again and again has this been done. Among the facts that are of great weight in determining whether the transaction is a sale or not, with the right to repurchase, is the adequacy of the consideration. When this is a small sum for the property it is a strong circumstance in favour of regarding the transaction as a mortgage, for it is not reasonable to suppose that the vendor intended to part with his property at a grossly inadequate price, unless the reasons why he should do such a thing are clearly brought to light. Says Jones: "Except as in New York and Georgia, there is probably now no dissent anywhere from the doctrine that in equity a deed may be converted into a mortgage whenever there are proper equitable grounds for the exercise of the power." In many states the statutes declare this can be done.

9. Secret agreements, not appearing on record, do not bind parties having no notice of them:

(*a*) As between the parties themselves and those who may know, they are often effective, but no principle of real estate law is better understood than this —that all arrangements, not open, are not binding on subsequent purchasers or parties who act in good faith. Thus, in most, if not all, states defeasances must be recorded, and, after this is done, the law at once assumes that everybody has notice of them; so

long as the record discloses nothing, no such notice is presumed, and, therefore, a bona fide purchaser or a creditor who might attach the estate would not be affected by knowledge, afterward acquired, of the existence of a defeasance.[1]

(*b*) An agreement between parties, which, in fact, is a mortgage, cannot be changed in character by any other agreement made at the time between them relating to the redemption of other matter pertaining to the transaction. "The right of redemption," says Washburn, "attaches as an inseparable intent created by law and cannot be waived by agreement." The universal rule, therefore, is, "if once a mortgage always a mortgage." The law will not permit, for the sake of public policy, a mortgagor to embarrass or defeat his right to redeem the estate by any agreement which he may have made in order to effect the loan.

Indeed, the courts are so careful to guard the rights of mortgagors to redeem that they will relieve against any agreement limiting the redemption to a fixed time, or restriction to a specified class of persons, or giving to the mortgagee, after the mortgagor's default, a right to purhase the estate at a particular sum. These limitations show the intent of the courts to guard, in every possible way, the rights of the mortgagor, and thus prevent him from parting with his property beyond all hope of recovery.

(*c*) This rule does not preclude a subsequent bona fide agreement concerning the disposition of the estate

[1] See 2 Washburn, § 997, p. 52.

between the parties. A mortgagee may always purchase the mortgagor's right of redemption, and, in this way, acquire an absolute title to the land. The courts will carefully scan the transaction, but if the contract was fair and adequate it will be sustained.

10. Two creditors who obtain simultaneous liens on the debtor's land become tenants in common because their equities are equal, or rather because no discrimination can be made between them. But, if a debtor should make two mortgages simultaneously, one to his vendor to secure the purchase money, and the other to a third person to secure an independent debt, the vendor's mortgage would take precedence over the other.

11. A mortgage may be made with a power of sale in the mortgage, whereby, on the non-payment of the debt at the time prescribed, a valid and absolute estate may be conveyed to the purchaser. Within the last three-quarters of a century, says Jones, "the use of them has rapidly extended, so that in several states any other form of mortgage is exceptional. The validity of these powers of sale is everywhere recognized and the use of them, either in mortgages or trust deeds, is becoming general." In executing a power of sale the mortgagee is the trustee of the debtor. Of course, he must act honestly and proceed in a way that will best serve the interests of the mortgagor. The parties may establish the terms of the sale, and, in all cases, the power must be strictly pursued, or the sale will be invalid. Moreover, the

power passes with the estate by agreement and is not affected by the mortgagor's bankruptcy or death.

A mortgagee, with such a power, who conveys his whole estate, passes the power also. But, if he convey only a part of the estate, as the power, from its very nature, cannot be divided, he can still exercise it, though not in a manner to interfere with what he has sold. After making a sale of the estate under the power, should there be a surplus, the mortgagee is a trustee for the mortgagor. If the mortgagor is dead at the time of making the sale his heir, and not his executor, can claim the surplus. In the way of a further application of this principle, a purchaser of the mortgagor's equity of redemption would be entitled to the surplus.

The death of the mortgagor does not revoke a power of sale, even though the mortgage is held merely to give a lien on the property. The expenses of the last sickness, of administration and management of the estate, allowance in lieu of homestead and other property exempt from forced sale, and the homestead right itself, wherever it exists, take precedence of the mortgage debt.

12. A mortgagee cannot purchase at his own sale and thereby extinguish the equity of redemption, even though the sale be public. This rule may be set aside by statute or by the terms of the mortgage. Whenever the sale is fraudulent it can be set aside. The utmost good faith is required on the part of the trustee.

13. A different rule applies to a sale made in good

faith by an officer of the law. At this the mortgagee can be the purchaser, though some courts contend that the sale may be avoided, as the officer in making the sale is really acting in the capacity of agent for the trustee.

In some states there are statutory regulations concerning such sales; where these exist they must be executed, in letter and spirit.

If at the time and place of sale there is no bidder present other than the mortgagee and his attorney, the officer or auctioneer making the sale should adjourn it. The application for an adjournment usually comes from some interested party, but this may be done by the officer without the request of any one.

14. Sometimes deeds of trust in the nature of mortgages are executed. In these a third person is brought into the transaction as an executor.

(*a*) The terms of the trust usually are, that the trustee shall reconvey to the grantor if he executes his part of the agreement, or, after failure to do this, shall sell the estate and apply the proceeds in satisfaction of the debt. The deeds are usually made by large corporations that wish to raise means on their properties, and are likened to mortgages rather than regarded as real ones.

In the deed the trustee may be authorised to sell the estate, or this power may be executed by another. The terms of the deed fix the rights of the several parties and prescribe how the property may be foreclosed and sold.

(*b*) A deed of trust may be made to secure future advances as well as present loans. Acting as agents of both parties, debtor and creditor, the conduct of the trustees, when requiring judicial examination, is carefully scrutinised. They cannot become purchasers of the estate, though the question whether the creditor in whose favour the trust has been created can become a purchaser or not has been answered in different ways.

15. In England a mortgage may be created by depositing title-deeds. This mode seems to be founded on reason because, in that country, until very recently, deeds were not recorded. The power to create this kind of a mortgage has been repudiated in many states in this country; and has been recognised only in a few of them.

16. A vendor may have a lien for his purchase money, and this lien is virtually a mortgage.

(*a*) This right affects all purchasers, even those who have no notice of the lien, and the vendor may, by virtue thereof, take the estate like a mortgagee. If, however, the vendee should mortgage the estate to a third person, who should put his deed on record, he would acquire a valid lien over the vendor supposing he has acted in good faith in making the mortgage. This kind of lien, though not prevailing everywhere, does prevail in a majority of the states.

(*b*) It is founded on the theory that, until the purchase money is paid, the vendee holds the land as a trustee of the seller for the purpose of securing it. Wherever this lien is recognised, no agreement is

needful to create it, and it is presumed to exist until the contrary is shown.

This lien is purely a matter of equity and is unknown to the common law. It prevails on the ground that otherwise the vendor would have no remedy, and that in justice he ought to have his purchase money secure in preference to others who may acquire liens afterward on property which in truth, until he has been paid therefor, really belongs to himself. Of course his lien may be defeated by any act showing his intention not to rely on the land for security. What such an act is cannot always be defined. An express waiver would be effective, likewise the taking of collateral security, bond or note with the security of an endorser, or a deposit of stock.

(*c*) A vendor's lien will prevail against an assignment that is made for the benefit of creditors, provided the vendor enforces his lien before the assignee executes his trust. But when land is attached by virtue of a levy of execution issued on a judgment against the vendee, the lien will not prevail.

(*d*) With respect to the notice of a vendor's lien, it is said that any notice, sufficient to put any reasonable man on his inquiry, will suffice.

What is a sufficient notice to charge a second purchaser with knowledge of the vendor's lien is an open question. If the original vendor remains in open possession, especially if the purchaser learns of an agreement relating to the land, this will suffice—in short, any notice that would put a reasonable man on inquiry. Thus, a purchaser who knows that a part

of the purchase money is unpaid, is in law notified of the lien. Again, notice to an agent of the purchaser or to his solicitor is a notice to the party himself.[1]

(*e*) A vendee who has paid any part of the purchase money for land before the delivery of the deed to him, has a lien for the amount advanced. It has all the characteristics of a vendor's lien, and may be enforced in the same manner.

(*f*) This lien does not arise in favour of a third party who pays the purchase money to the vendor for the purchaser and takes his note for the amount.

(*g*) The assignment of a debt secured by an express lien on property by agreement between the parties will give the assignee the benefit of the lien also. Therefore, the assignment of the vendor's claim for the purchase money carries therewith his lien, whether express or implied. This rule does not prevail in every state. In some of them the lien is personal, and does not pass by an assignment of the claim.

(*h*) The lien may be enforced by a court of equity by ordering the sale of enough land to satisfy the lien. This cannot be done by a collateral proceeding, but only by a suit brought for the purpose.

17. A mortgagor having an equity of redemption may mortgage this by successive deeds which will take precedence in their order of execution. Indeed, he can make any number of subsequent mortgages, one after the other, as if none had been made on his estate. Of course the interest acquired by each subsequent

[1] 2 Washburn, § 1029, p. 81.

mortgagee is subject to the interests of those who preceded.

18. There can be no mortgage without a debt. This must be sufficiently described so that it can be recognised and distinguished from other obligations. It must involve a personal obligation which is independent of the mortgage.

19. Two different legal theories are held concerning the operation or nature of a mortgage, and these must now be explained.

(*a*) One theory is that the mortgagee thereby acquires the estate which formerly belonged to the mortgagor who can reacquire it by paying the loan. Furthermore, the mortgagee retains his ownership until the mortgagor fufils his agreement. The actual estate is in the mortgagee, the mortgagor is simply a reversioner, having a right to repossess himself by performing the prescribed condition.

(*b*) By the other theory the mortgagor is the owner of the land and remains so until he fails to fulfil the agreement on his part, after which the mortgagee becomes the owner. This is known as the "lien theory," and is rapidly growing into judicial favour. Thus, in a recent case in Kentucky the Court of Appeals remarked: "The law is well settled that a mortgage is a mere security, and, both at law and in equity, the mortgagor is the real owner of the property mortgaged; and a mortgagee has no lien upon the rents and property unless he has, in the mortgage, stipulated for a specific pledge of them as part of his security; nor is he entitled to the insurance which may

be collected by the mortgagor upon the buildings upon the property, unless the mortgage expressly stipulated that it shall be for his benefit." [1]

20. Any change in the form of indebtedness for which a mortgage is made will not affect the debt. Its existence will remain just the same. Nothing short of actual payment, satisfaction, or release will discharge it. The giving of a new note, therefore, for the original one, with a different date and amount unless intended as payment, will not affect the lien.

21. Both mortgagor and mortgagee may insure the premises. The latter can only insure for the amount of his debt. In taking out a policy in his own name and paying the premium, he takes the insurance money, in the event of a loss by fire, free from any right of the mortgagor to have it applied for the liquidation of the mortgage debt. He can, if he pleases, require the insurance to be paid, and then proceed to collect the debt. But, if he insures at the request of the mortgagor, or in consequence of his neglect and at his expense, the mortgagor will be subrogated to the benefit of the insurance, and the money must be applied to the debt.

22. As between a mortgagor and a mortgagee, the latter has his remedy against the former for any misuse of the estate. He may sue him as a trespasser, or in an action of waste for improvident or unreasonable use. In like manner the law holds the mortgagee to a like account, when he is in possession of the premises, for using them in any way incon-

[1] Gill v. Corinth Deposit Bank, 68 S. E. Rep., 870, 871.

sistent with the legitimate purposes of the security.

In much the same manner as a tenant for life can be enjoined from misusing his estate, as previously described, the mortgagee may enjoin the mortgagor from committing waste. If the mortgagor leases the premises subject to the mortgage, and the tenant is recognized by the mortgagee, he becomes the later's tenant, and cannot be treated as a trespasser.

23. A mortgagee who purchases the equity of redemption acquires the entire interest, and becomes the sole owner; the estates of both mortgagor and mortgagee are merged into one.[1]

24. A mortgage is often made to several persons, sometimes to secure two separate debts, sometimes to secure one or more joint debts due to the mortgagees. If the mortgage is made to secure separate debts the interests of the mortgagees are several and not joint, but the amount is measured pro rata by the respective amounts of the other debts. If the debt be joint the morgagees are joint tenants of the mortgaged estate, and a release by one of the mortgagees would discharge the mortgage. As soon as the mortgage has been foreclosed and the legal estate made absolute, it is converted into a tenancy in common between the owners. If one of two joint mortgagees dies before the mortgage is foreclosed the survivor may bring an action for that purpose.

1 "This is not necessarily so, but, on the contrary, when it is not the intention of the parties that it shall merge, or when it is not to the interest of the mortgage that such merger should take place, the mortgage continues to subsist." See note, 99 Am. St. Rep., 162.

25. Two owners of distinct parcels who mortgage them to secure a joint debt charge both parcels equally for a moiety of the debt.

26. Successive mortgages duly registered take effect in favour of the successive holders in the order of registration. This is simply an application of the general rule that registration is a constructive notice to all persons having knowledge of it. But when two mortgages connected in the same contract are made to two parties, respectively, neither gains any precedence over the other by recording his deed first; their equities are still equal.

In many states a judgment takes precedence of an unrecorded mortgage.

27. How far a devise of land will pass a mortgage thereon is an unsettled question. The more general rule is, in devising one's real estate, mortgages are included in this term. On the other hand, a devise of money securities includes a note secured by a mortgage. A testator, who after making his will devising his land, forecloses a mortgage existing at the time of making his will, transfers it as real estate.

28. On the death of a mortgagee his interest in the estate mortgaged descends to his heirs. This is the rule at law, but in equity both mortgaged interest and debt go to the executor or administrator, and the heir cannot release the mortgage. On one occasion the heirs of a mortgagee conveyed the premises before the mortgage was foreclosed. This was held not to operate as an assignment of the mortgage. An

executor or administrator may assign one. This authority is given him by statutes in most of the states, and therefore the executor or administrator of a mortgagee may recover possession of the land thus secured, and must account for the same as personal assets.

29. In some states, on taking land for eminent domain, the mortgagor may claim damages; likewise for flowing his land with water in states where this right is given to mill-owners. Again, in laying out a highway or in repairing a street the mortgagor, if in possesson, is deemed the owner and proceedings must be conducted accordingly. The taxes are a lien which are assessed on the mortgagor if he is in possession.

30. The mortgagor may insure the full value of the property and recover the full amount insured, if at the time of the loss he had the right of redemption, even if his right in equity has been seized and sold, so long as his right to redeem continues. The mortgagee and mortgagor may both insure their separate interests at the same time; nor is their action regarded as double insurance.

31. A mortgagor cannot be charged with the rent before the mortgagee has obtained actual possession even though the land is an inadequate security for the debt. The same rule applies to rent accruing after the beginning of a process for obtaining possession.

32. A mortgagee, by accepting a deed from his mortgagor, cannot deny his title; but a mortgagee may purchase an outstanding prior title, and hold thereby

as paramount to his mortgage title. A mortgage is not negotiable, and, consequently, an assignee takes its subject to the equities existing between the original parties. Where the lien theory prevails the bona fida endorsee of a negotiable note secured by a mortgage is entitled to enforce the security notwithstanding the equities existing between the original parties. But this rule does not apply unless the assignee is entitled to the privileges of a bona fide endorsee against the maker.

33. Any person interested in a mortgaged estate has the right to redeem it—the various mortgagees, heirs, devisees, creditors, and other parties. The owner of an interest, however small, has an equal right with others to redeem and thus save his own interest.

34. The entire debt must be paid to work a redemption of the mortgaged state. Nothing short of this will release the mortgagee's interest. But an offer of payment made at the proper time is effectual to bar a foreclosure of the land.

35. A sale of land on the foreclosure of a mortgage extinguishes the lien thereon, whether the entire debt thus secured is satisfied or not.[1] Of course, the mortgagee still has a valid claim against the mortgagor for the unsatisfied balance. Therefore, as the mortgagee's lien is discharged by a sale of the property, a judgment creditor or other interested person who should offer to pay the mortgagee all that he has paid for the property at the sale, with the interest, if any has since accrued, may become the owner of the prop-

[1] First National Bank v. Elliott, 125 Ala., 646.

erty without paying the unpaid balance of the mortgagor's indebtedness.[1]

36. A mortgagor who redeems regains his estate as fully as if no mortgage had ever been made. Therefore no lease, charge or encumbrance made by the mortgagee during his qualified ownership can be set up against the mortgagor.

37. One of several persons who redeems a mortgaged estate by paying the whole debt becomes and remains an equitable assignee of the mortgage, until the respective parties interested therein contribute their due proportions. But if two tenants in common join in mortgaging the common property to secure the debt of one of them, and the other then conevys his share to the mortgagee, the one whose debt was secured must pay the whole debt to redeem his share of the estate and thereby relieve the other share.

38. One who purchases or acquires by assignment an estate subject to a mortgage, or a right in equity to redeem an existing mortgage, cannot set up usury in the mortgage to defeat or diminish the claim of the mortgagee. In like manner one who purchases an equity of redemption at a sheriff's sale cannot deny the validity of the mortgage itself. But one who purchases a mortgaged estate, or takes a second mortgage thereon, may take advantage of any defect in the mortgage in the same manner as the mortgagor himself could do.

39. In legal proceedings to redeem tender of the amount due must be made. But if the mortgagee has done nothing to prevent the mortgagor from perform-

[1] Same case.

ing his part of the agreement, he will be entitled to costs.

40. A mortgagor may be barred of his rights to redeem when the mortgagee has been in possession of the land adversely for the requisite period. The law presumes by such a long possession that the equity has been extinguished. But no length of possession by the mortgagee will bar the mortgagor's right to redeem, if the mortgage has been treated throughout the period, as a security for the debt. In other words, to make the mortgagee's action effective to extinguish the rights of the mortgagor, he must act in a manner openly adverse to the other's rights.

41. On the other hand, the law will presume payment of the mortgage from long-continued possession by the mortgagor without paying rent or interest, or admitting the existence of the debt. When payment is thus presumed from lapse of time, of course the mortgagee cannot bring a bill for the forclosure of the land.

The tender must be made by someone who is entitled to redeem. Anyone who has an interest in the mortgaged premises has this right. Among these may be enumerated the granteees, subsequent mortgagees, judgment creditors, heirs, devisees, and the like.

A tender, thus made by a person having the right to redeem at the maturity of the debt, works a complete discharge of the mortgage, and the mortgagee no longer has any right or interest therein. Furthermore, if the mortgagee should be in possession, an action of ejectment would lie against him just as against any other wrong-doer, to turn him out of the premises.

42. Payment of the debt by a volunteer—that is, a stranger who is not interested in the mortgaged premises—will not extinguish the mortgage unless an assignment is actually made to him. Nor can he claim an equitable assignment, even though he has paid the debt. Again, payment by one who is not under a prior obligation to pay, but is secondarily liable as a surety or as an endorser, does not always operate as a discharge of the debt, but the payee may, by thus paying, become, in equity, the mortgagee. In other words, if his interest requires that the mortgage should be kept alive after having paid it, a court of equity will regard the transaction as an assignment of the mortgage to him, and not as a discharge of it.

43. The payment of the debt by a surety operates as an assignment of the mortgage to him, and he can enforce it against the mortgagor or his heirs and assignees. He is, in truth, only secondarily liable. The mortgagor is the primary debtor and the land is a primary fund out of which the debt must be satisfied.

44. Payment of a mortgage may always be proved orally or by any facts which clearly evince a payment or discharge of the obligation. Possession of the note by the mortgagor is not always absolute evidence that the debt has been paid when this can be satisfactorily explained. Without explanation the mortgagor's possession creates a strong presumption that it has been paid.

45. Usually, on payment of the mortgage, the mortgagee gives a deed of release or formal discharge, which is put on record, thus showing that the encum-

brance no longer exists. Ofttimes this is omitted, or the release given to the happy mortgagor, he has forgotten to have recorded; and so the cloud remains on the title, to the great vexation, it may be, of someone at a later period, who may wish to sell or purchase the property.

46. On the death of a mortgagor his heirs may call on the executor or administrator to pay the mortgage out of the personal estate, for the reason that it was primarily given for the benefit of the personal estate of the deceased. In like manner a devisee can call on the executor or administrator to pay the mortgage, and thus relieve the real estate of the encumbrance. This principle extends no further, and legatees, both general and specific, as well as creditors, can make no such demand on the executor or administrator.

47. But an heir who sells an equity of redemption that descends to him, without exercising his right to have the mortgage paid out of the personal estate, cannot afterward call on the executor or administrator to discharge the mortgage. This rule is of general application.

48. In like manner the holder of an equity of redemption who has acquired it by purchase has no right in equity to call on any other fund for the relief of his own estate.

49. The courts will not apply the personal property of an insolvent estate to discharge a mortgage. Nor can the personal assets existing in one state be used to relieve the real estate in another state of any encumbrance existing thereon.

50. One of two persons, jointly liable for a debt, who pays the whole has a right to call on the other for contribution in proportion to their several interests. The test to apply to contributors is, are their equities equal. If they are, the right to contribute exists, otherwise it does not. A mortgagor, for example, who has sold a portion of the land covered by the mortgage by a warranty deed, cannot claim a contribution of the purchaser, because he is himself liable for the whole debt.

51. Again one of two or more parcels of land, simultaneously conveyed by a mortgagor to different persons, may be sold under a foreclosure. In such a case the assignee or grantee of that parcel has a right to recover from the assignees of the other parcels their pro rata share of the debt. The debt is a liability among them in proportion to the value of their respective parcels.

When the assignments have been made successively or at different times, the courts have had great difficulty in establishing a rule to govern parties in such relations. Perhaps the best rule is to regard the liability of the respective parties as accruing in the reverse order of assigning the property. In other words, the first assignee is the last one to be held liable, and the last assignee is the first one to be held liable for the payment of the mortgage. By this rule, therefore, he is held for the entire amount. Should he be unable to pay all, the next preceding assignee would be liable, and so on until the first was reached.

52. A mortgagor, who, after executing his deed, con-

veys parcels of the mortgaged property to persons at different times by warranty deeds that contain no reference to the mortgage, is primarily liable on the land he retains for the entire mortgage debt. This, therefore, must be first sold to satisfy it, and, if insufficient, then the mortgagee must resort to the parcels conveyed and sell them in the inverse order of purchase.

53. Another principle applies in the case of two or more parties interested in the same mortgaged property. Suppose a creditor holds two mortgages on two different estates to secure one debt, and a creditor of the same debtor has a later mortgage to secure his debt on one of the parcels. Equity requires the first mortgagee to exhaust the security he has in the parcel not covered by the second mortgage before proceeding against the latter parcel. In like manner a mortgagee who holds collateral security in addition to a mortgage must first exhaust his mortgage security before calling on the surety. So, also, a senior mortgagee must exhaust so much of the mortgaged property that does not secure a junior mortgagee before resorting to the property on which the junior mortgagee relies.

54. With respect to a mortgagee's right to charge for personal services in taking charge of an estate, collecting the rents, etc., the general rule is that this cannot be done except when it is necessary to employ a bailiff or agent to do the business. This rule of late years has been somewhat modified, and Jones says that in determining the amount of compensation to be made to the mortgagee, reference should be had to the nature

and condition of the property, and to the stipulation, if any, contained in the mortgage relating to the matter.

55. In an action to redeem, the mortgagor may call for an accounting by the mortgagee. This will be ordered whenever the mortgage debt involves a long account of charges. Such an accounting is especially necessary when the mortgagee has been in possession of the land, and has received the rents and profits, and has expended money in keeping the premises in repair. The case is, then, referred to a Master in Chancery, who determines the whole matter.

In conducting this accounting the leading questions are, what are lawful debits and lawful credits? The mortgagee will be charged with whatever rents he may or ought to have received in managing the estate. He will also be charged with all damages done to the premises by himself or by others with his authority or permission. Thus, he is liable in damages for opening a mine or for letting the premises fall into decay. On the other hand, he is entitled to credits for all proper expenses incurred in maintaining the buildings. An author says that the true rule seems to be that he would be allowed only such expenses as he incurred in making repairs that were necessary to keep the premises in the same condition as that in which he received them; and for such improvements beyond that limit that were necessary to the ordinary and reasonable enjoyment of the premises. In some states he has been entitled to the cost of lasting and permanent improvements of a truly beneficial character.

56. To bar the mortgagor's equity of redemption and acquire the absolute title to the property, the mortgagee must bring an action for foreclosure. There are two kinds of species of this remedy. The first is called a strict foreclosure. By this a decreee is rendered barring the mortgagor's equity and vesting the absolute estate in the mortgagee if the debt be not paid within a certain time after rendering the decree. The other is called an equitable foreclosure, and is the remedy in most general use. When this is granted the court renders a decree ordering the property to be sold and the proceeds to be applied in liquidating the debt. If any surplus remains, this is paid over to the mortgagor. The bill to foreclose may be filed at any time after the mortgagor's failure to comply with the agreement to pay his obligation; in other words, after his failure to pay his debt or debts as he has promised to do.

All persons interested in the determination of the suit should be made parties. This includes all subsequent purchasers, other mortgagees, persons holding judgments, judgment creditors, and the like. There is a question, sometimes, concerning the mode of ranging them on one side or on the other of the action. Those who are not made parties in bringing of the proceedings should be summoned as parties to defend them.

It is needful to summon all parties for the reason that, should any be omitted, they would not be affected by the decree rendered by the court. In strict foreclosure the decree makes the estate absolute in the

mortgagee. The legal estate descends to his heirs instead of to his personal representatives.

57. The effect of a decree on a minor is to bind him unless, within a period of six months after arriving at majority, he can show some error in the foreclosure. If this is by a sale of the land the minor cannot disturb the title acquired under the decree. Judgment in such cases is binding for the reason that the chancery courts have jurisdiction over minors, and are supposed to adopt sufficient precautions to protect their interests.

In a suit for strict foreclosure there can be no action on the surplus of the debt remaining unsatisfied. A mortgagee who wishes to collect the unsatisfied balance must open the foreclosure, and have the property sold under judicial decree, and enter the amount of the judgment against the debtor.

In the ordinary cases of foreclosure, as we have stated, the proceeds of the sale are applied to the liquidation of the debt, and, if these are not sufficient, the mortgagee has a remedy in an original action at law to recover the balance. It will thus be seen that the debt is not extinguished by taking the land. This is simply a security, and the debtor is still liable, if enough cannot be obtained to extinguish the debt.

If there be more than one mortgage, and if a surplus remains, after paying the expenses and the first mortgage debt, the balance goes to the junior mortgage; if there be several, then to them in the order of the priority of their claims. Should there be a surplus after paying all the mortgages, the balance belongs to

the mortgagor, or, if he be dead, to his estate.

58. A mortgagee may assign his rights; his assignment should be prepared in a manner as formal as the original deed of mortgage. This should be recorded also in the same manner, to give all parties notice of the transaction. This is the proper manner of making an assignment. Thousands of cases have arisen in consequence of the neglect of parties to fulfil this simple and proper requirement.[1]

59. Sometimes an assignment is written on the back of a mortgage itself, and is delivered, with the mortgaged deed. This transfers absolutely the interest of the assignor, but the potency of the transfer, with respect to other parties, depends on the notice they receive of the transaction.

60. The mortgagor also may sell or assign his remaining interest. The assignees enjoy all the rights and assume all the liabilities of their respective assignors. If the mortgagee is entitled to possession so is his assignee, who may also appropriate the rents and profits, as the mortgagee could have done had he remained in possession. The assignee of the mortgagor, on the other hand, has a right to redeem the estate, and call upon the mortgagee to account for the rents and profits received by him, as if he had been in possession.

61. The assignees of several debts, secured by the same mortgage, that have been successively assigned, will share the benefit of the security pro rata. If the debts secured by the same mortgage are payable at

[1] For form of assignment see Vol. VI, Appendix, No. 15.

different times, they are to be paid from the mortgage fund in the order in which they are due. The holder or owner of a mortgage made to secure several debts may assign one or more of them in such a manner as to give the assignee a preference over other debts. In applying this principle some difficulty has arisen when the same mortgage deed secures several different debts which have been transferred by the owners to different individuals without assigning the mortgage. In some states the mortgage is regarded as a separate mortgage for each debt, and an assignment of one of them carries therewith its proportion of the mortgage interest; and, in the distribution of the proceeds springing from the sale of the land, they are paid to the several holders in the order in which their debts became due.

62. After a mortgagee has assigned the mortgage he can discharge no part of the premises from the mortgage by a release. While he holds it he is not obliged to enforce the mortgage pro rata on the several parcels, though belonging to several different persons. He can elect to enforce it on all or any number of them, and any oral agreement at the time of making the mortgage, embracing several parcels, to discharge any one of them on the payment of a certain sum, is inoperative. Nor can a mortgagee, by releasing several parcels, throw more than a pro rata share of the mortgage debt on the other parcel or parcels.

63. In assigning a debt secured by a mortgage the law of the place where the agreement is made will govern. When the transaction is regarded as a trans-

fer of real estate, then the law of the place where the land is situated must be applied.

64. Where the mortgage and debt are inseparable, and they are so regarded in many states, an assignment of the mortgage without the debt would be void, and a person occupying under such an assignment would be a trespasser. Where the mortgage and debt are separable, the debt can be assigned without changing the record. In all cases the safest mode of procedure is to make a formal assignment in writing, like a deed, and record it.

When an assignment has been made in a less formal manner the above question has arisen between subsequent parties, attaching creditors, and the like, and the original mortgagor and mortgagee. As no uniformity exists in the decisions of the courts on this long series of questions, we shall not attempt to deduce any rules from them.

§ 12. By Tenant by the Curtesy

1. Curtesy defined.
2. There must be a legal marriage.
3. Wife's estate must be inheritable.
4. Birth of a child.
5. Duration of his estate.
6. It can be taken for his debts.
7. He may forfeit his estate.
8. How estate by the curtesy has been affected by legislation.

1. A husband acquires an interest or estate in land belonging to his wife after her death, and is called a

tenant by the curtesy. Four requisites are needed to create such an estate: her lawful marriage; her possession of the land during her marriage; the birth of a child alive during her marriage; and her death.

2. The marriage must be legal. Though a marriage is unlawful, if it is not set aside during the life of the wife, the estate of curtesy will arise at her death. The marriage cannot afterward be declared void.

3. The wife's estate must be inheritable. The curtesy extends to various equities and interest she had in lands; also to money which was intended to be laid out in them for her benefit. In such cases, as in others previously mentioned, equity treats the money as land itself; and the husband takes the same interest in the money that he would take had it been transmuted into land itself.

When the wife's interest in land rests on a condition that may defeat her interest, the husband's curtesy may also be defeated. In other words, his curtesy never survives after the destruction of her interest. In accord with this principle, should the wife own land with two or more joint tenants, and die, her husband could not claim the curtesy because, from the very nature of joint tenancy, the land belonging to the joint tenants on the death of any tenant passes to the survivors.

Formerly, the wife's possession was regarded as essential to create an estate by the curtesy in her husband after her death; in many states this principle has been modified. So far, indeed, that on the completion of her title, though she is not in formal posses-

sion at the time of her death, her husband is entitled to his curtesy.

A different principle applies to wild land, for the ownership draws the legal possession without having taken actual possession. In Kentucky, however, actual possesion is requisite in order to give the curtesy in wild lands.

The husband can have no curtesy in land of which his wife is possessor merely as a trustee.

4. The wife should have a living child who might possibly have inherited the estate, otherwise her husband's curtesy will not rise. It is immaterial whether the child was born before or after the wife acquired her estate. The important fact is, would the child, if living, have inherited the estate? If so, the husband is entitled to his curtesy therein.

As soon as a child is born the husband's right to curtesy is said to be initiate, or to have begun, and is consummate only at death.[1] This is the common law rule, but "in many states," says Washburn, "the necessity of a child being born is dispensed with by statute."[2]

5. His estate, though having its origin in his obligation to support his children, is only for his own life. Nevertheless, his right is just as complete, whether they need his support or not; or whether they live for a brief space, or for many years.

6. The husband's interest, initiate as well as consummate, can be taken for his debts, nor can he defeat the right by any disclaimer, nor will equity interfere in

[1] 1 Washburn, § 343, p. 157. [2] 1 Washburn, § 341, p. 156.

favour of wife or children to prevent his creditors from levying thereon.

7. He may forfeit his estate; in some of the states this is one of the consequences of legal separation. Recently, the Supreme Court of Missouri decided that a divorce deprived him of his estate by the curtesy, even though he was the innocent party to the proceedings, for it was voluntary on his part. In some states the interest of an innocent husband in his wife's land still continues. The reasoning of the Missouri court is very persuasive.

8. In concluding this section it may be added that this right of curtesy, which has long been recognised in Anglo-Saxon society, is founded on the idea that the husband is bound to maintain his children, and therefore it is proper that the wife's property should, to some extent, be devoted to the same purpose. The property rights of married persons have been greatly changed by legislation during the last fifty years. Thus, a woman is entitled after marriage to retain and acquire property very much as an unmarried one; also to make contracts with great freedom; consequently, in many states, a husband's right by the curtesy in his wife's real estate after her death has been abolished. In a few the right remains greatly modified, so a statement of the leading principles pertaining to the subject has been given.

§ 13. By Widow as Dower

1. Dower defined.
2. Priority of husband's creditors.

3. To what estate dower belongs.
4. She must join in every deed with her husband, to convey a good title to his land.
5. There must have been a valid marriage.
6. How her dower may be lost.
7. Assignment of dower to her.
8. Modes of assigning it.
9. Her remedy when it is not assigned.
10. Assignment of money in lieu of dower.
11. Provision by jointure.
12. Provision by will of testator in lieu of dower.

1. Dower is the interest a wife possesses in her husband's land after his death, and is largely regulated by statute. Usually it is an interest for life in the use of one-third of his real estate. As long as the married relation exists, her interest is in the nature of an encumbrance, or inchoate right, which she cannot assign or sell except by joining in a deed with her husband. At his death the right becomes consummate or perfected; until then, it is not an estate, strictly speaking, in any land. The setting apart of land for her use is called the assignment of dower; and, when this is done, she has a life-estate therein with all rights and incidents pertaining to an estate of that character.

2. In some states she holds her dower subject to the claims of her husband's creditors; generally, her dower is preferred to them. Of course, a mortgage or other lien of that nature on the land, existing at the time of his death, is not impaired by that event; but the ordinary claims of creditors against him cannot be trans-

formed into legal judgments and her dower lands be taken in payment.

3. A widow has dower in any estate belonging to her husband which her children, if any, could have inherited as his heirs. It includes everything definable as land. She, therefore, has a dower in land that has been mortgaged by him, subject to the mortgage; in short, to all estates in which he possesses an equitable as well as a legal interest. But it does not include an estate held by him as a trustee.

When the wife's dower is in mortgaged land, her interest does not become complete until after the foreclosure and satisfaction of the mortgagee's claim. Her dower then attaches to the remainder, and she is entitled to the use of such a portion as the law prescribes.

Again, when it is necessary that land in which she possesses an interest should be sold, her right will follow and attach to the proceeds of the sale.

Of course, the widow's right of dower in her husband's land is affected by his title thereto. If he was never the possessor before and after marriage, because another person was in possession as adverse owner, dower will not attach. In such a case her right will become effective only after he has recovered possession. No length of time is required after his possession to secure her right of dower. The vesting of the possession in him, even for a short period, is sufficient.

To this rule must be noted an exception. She will acquire no dower interest in land of which her husband may be the nominal possessor. For example: some-

times a conveyance cannot be made directly to a person, but only through the medium of another. Should this medium happen to be a married person, his wife would acquire no dower in the land of which, for a moment, he was the legal owner. Another example may be given—that of a mortgage. Suppose a married man should purchase a piece of land and give a mortgage thereon to the vendor for a part or all of the purchase price. Strictly speaking, there is a moment of time during which he is the entire owner. In truth, it was not intended between the parties that the wife should acquire a dower or inchoate right therein which should precede the mortgagee's interest. Save exceptions of this character, the wife is entitled to dower in all of the lands of her husband, wherever they may be, subject to the laws of the place where they may be located.

4. By reason of her inchoate right or interest in her husband's land, the law requires, in nearly all the states of the Union, that she should sign every deed conveying it, in order to insure a good title to the purchaser. This requirement is now well understood, and blank deeds are usually printed conforming with the law. Not infrequently the wife has not signed, doubtless from accident, and therefore has given a defective title, amended, perhaps, if at all, at considerable cost and after long delay. The legal requisites pertaining to the execution of such deeds are defined by the statutes of the different states.

5. Like an estate by the curtesy, a legal marriage is necessary to sustain an estate of dower. If it is a

marriage which can be set aside, but is not, then it is known in the law as a voidable marriage, which, unless avoided during his lifetime, will sustain her right of dower on his death.

6. The wife's right of dower may be lost or barred by a legal separation or divorce. By a remarriage, or a setting aside of the divorce, her dower rights revive. In other words, it is necessary to support her claim to dower that she should be the wife of the husband at his decease. Consequently, if they have been divorced, whatever may have been the cause, the dower is extinguished, unless the statutes, as some of them do, contain a saving clause, giving the innocently divorced wife the right to enjoy her dower as if she were still his wife.

Again, her dower may be lost by the defeat or destruction of her husband's estate. For example, another person may claim the title and by a proper legal procedure, prove his better title thereto and thus become the possessor. In such cases, in which the husband really has no estate at all or in which it has been taken away from him by legal process, her interest therein also fails. Or, to change the form or expression, she cannot acquire or preserve a dower estate after her husband fails to acquire or preserve a still greater one.

While this is the law, the wife's inchoate right of dower cannot be affected by the action of an adverse possessor of her husband's land during the period of marriage, or, to use a technical term, during coverture.

Her right may be defeated by the exercise of eminent

domain by the state. This exercise of public power is paramount to every individual right in land, and applies as much to women under all conditions as to men.

7. On the husband's death his wife is entitled to an immediate assignment of her dower. Until the assignment is made, for a period of forty days she has a right, at common law, to reside in the principal house on the estate, provided she does not marry within that time. This right is called her quarantine. The common law period has been changed in many states by statute. The general rule is that dower must be set out to her during this period; if it be not, the law prescribes for her the remedy.

8. There are two modes of assigning dower, which may be briefly described. The dower of "common right," so called, is to give her a definite piece of real estate. This is done by the sheriff under proper directions from the court. The kind of land set out to her depends largely on its nature, location, etc., and need not be more fully described. The extent of her one-third interest is determined by the market and productive value of the land, instead of the quantity. She is entitled to such a portion of the estate as will yield to her one-third of the rents and profits of the whole.

The other mode of assignment is called "against common right." This is done by agreement. This mode will effectually bar the claim to dower of common right, if properly and legally executed. In adopting this mode it is the common practice for the widow to give a release, under seal, of her dower right.

9. On refusal to assign dower to her, as the law

requires, she may have recourse to ample remedies. One of them is an action at law to recover it; another is a similar proceeding in equity; a third and more common practice is a summary proceeding in the court having direction of the settlement of the estate. The action must be brought in the county where the land lies, to which the law of the place must be applied. As the action is personal it dies with the widow.

Success in her action is followed by judgment for the assignment of dower and sometimes for damages also for the delay in assigning it, though not at common law. They are a matter strictly of statute.

10. In some states, by statute, money is assigned instead of land as dower. A gross sum is assigned in such cases instead of an annual share in the income.

11. Again, dower may be barred by a jointure, which is a provision made for the wife by the husband out of his property. This is done before marriage, and is a complete bar to her dower only when made before that event. When made afterward she has a right to elect whether to take her jointure or her dower, but cannot take both. Formerly, jointures were frequently made but, of late years, they have given way to marriage settlements, or specified agreements in which the terms greatly vary with circumstances.

12. Finally, a testator sometimes provides for his widow in lieu of dower. This is not unusual. After he has done so she can elect either to take what the testator has given her, or to reject it and claim her right of dower. Suppose, for example, that a testator should possess a large amount of real property, and in

his will should give his wife a comparatively small sum of money on condition of renouncing her right of dower, very likely she would reject the legacy and claim her right of dower, as she has often done. If she accepted the legacy it would completely extinguish her right or interest in the real estate.

§ 14. By Homesteaders

1. Object of legal protection of homestead.
2. Constitutionality of the laws.
3. Right cannot be affected by subsequent legislation.
4. How the courts regard homestead laws.
5. What is a homestead.
6. Amount of land it includes.
7. Meaning of head of family.
8. What debts for which homestead cannot be taken.
9. What rights the homesteader can exercise.
10. How homestead can be destroyed.
11. Wife must join in conveying homestead.

1. Many of the states, within a comparatively short period, have conferred rights on the owners of homesteads. Their principal object is to protect them from seizure for the debts of their owners. Such a policy is deemed worthy by the state, as other persons beside the homesteaders are interested in their preservation.

2. As the Federal Constitution prohibits the states from passing laws impairing contract obligations, no state can withdraw the land of an individual from his

contemporaneous creditor. Could a homsteader beguile his creditors with the knowledge of his great possessions and afterward secure such legislation, they would be greatly wronged.

The constitutional provision relates solely to contracts between individuals, and to no other kind of property. But a judgment rendered in an action not founded on a contract, but on a wrong, is not affected by this constitutional requirement. Consequently, a homestead law preserving the land of a homesteader from such a judgment would not be an invasion of the constitution, because the wrong-doer's liability did not spring from the violation of a contract.[1]

3. The homestead right, having once attached to the land, cannot be changed, without the owner's consent, by subsequent legislation. Thus, an exemption of a specified number of acres of land in the country or city, which has been impressed with a homestead character, cannot be affected by the subsequent incorporation of the land without the owner's consent. The owner may, however, abridge his right by dividing it into parcels and offering them for sale.

4. At first the courts, looking on homestead legislation with an unfriendly eye, construed it strongly against the homesteader. Through more familiarity with its operation and with the growth of public sentiment, the courts now give full effect to its intent and purpose.

5. A homestead, within the meaning of this law, is the home or permanent place or residence of the owner

[1] McAfee v. Covington 71, Ga., 272.

of the land, and includes the area specifically prescribed, which varies greatly in the different states. Nor is its character changed by the owner's temporary absence. On the other hand, it does not partake of this character through mere intention. The same rule does not apply to such land as applies to land acquired by a person for the purpose of exercising the right of suffrage. To stamp land as a homestead it must be used as a home.

6. Whether the amount of land that may be thus marked must consist of a single piece, or may consist of several pieces, is an open question. In an Arkansas town a person purchased one-third of a town lot, on which was a building wherein he kept a retail store. Afterward, he purchased the remainder of the lot and erected thereon a residence. Though the parts were separated by a fence, the entire lot still retained its homestead character. Nor was its character as a homestead affected by mortgaging the residential portion only and by a relinquishment on the part of the owner's wife of her dower rights therein.

Again, when a statute prescribes that the land must be a single tract or piece, can any portion extend on the other side of a street? If the owner is also the owner of the land in the highway, the public simply possessing an easement or right of way over the same, the tract is regarded as an entirety and within the law; but if the several portions, claimed as a homestead, are separated by a street which belongs to the public, the owner can claim as a homestead only that piece or portion on which his house is situated.

7. Of two or three other questions perhaps the most important is, what is meant by the head of a family, a phrase contained in every homestead act? Any person, man or woman, married or unmarried, on whom rests the duty to provide for the support of one or more persons sustaining the family relation. For example, an unmarried man with whom reside his widowed sister and her children; or, for a simpler illustration, a man who supports his mother. An unmarried woman with whom live the children of a deceased sister is considered by the homestead law as the head of the family. Furthermore, they need not all live under one roof, or be employed about the house. It is the relation and the dependence on that relation, not the mere aggregation of individuals, that constitute the family. On the other hand, the moral obligation will not suffice if the dependents do not reside with the homesteader, even if he actually supports them; nor is a temporary support sufficient. Finally, the obligation to support must not arise simply from contract alone, as distinguished from obligation founded on dependence.

8. Let us ascertain more definitely what debts are outside the pale of homestead legislation. Taxes for municipal purposes may be collected; and purchases for improvements are a lien on the land. Thus, in Georgia, the expenses of an attorney, rendered in defeating a homestead, were considered as somewhat akin to purchase money. Furthermore, the original debt retains this character, and cannot be extinguished by any assignment or renewal. But money borrowed to pay off a pre-existing debt does not come within the

rule. On the other hand, a person who advances purchase money at the time of buying, for the express purpose of securing a conveyance to the vendee, on his promise to execute a mortgage for the amount, has a lien on the land therefor.

9. The head of a family can sell or mortgage his homestead, whether he is solvent or insolvent; and his creditors cannot prevent the sale, for, having no claim on the homestead, their rights are not impaired. His right is equally complete to dispose of one homestead and with the proceeds to acquire another, which is just as safe from the invasion of creditors.

10. A homestead may be destroyed or abandoned, but premises that have once been impressed with a homestead character do not lose it by the removal of the dependent members by death or marriage. In other words, while no man who is not the head of a family can become a homesteader, he may cease to be a family-head without ceasing to be a homesteader. Again, there must be a substantial compliance with the statute prescribing a form of waiver for abandoning a homestead; no expression of intention will be effectual. And whether one has abandoned his homestead, or not, is a question of combined residence and intention. Temporary absence for purposes of health and pleasure will not work an abandonment, but a departure with the intention of abandoning the premises as a permanent residence will destroy its homestead character.

11. The statutes generally prescribe that the homestead of a married homesteader shall be conveyed only with his wife's consent.

§ 15. By Tenant from Year to Year

1. Who is such a tenant.
2. Tenancy founded on contract.
3. Notice to quit.
4. Tenancy cannot be changed against lessor's will.
5. Nature of tenancy.
6. Repairs.
7. Notice to quit.
8. Service of notice.
9. Liability for rent.
10. Waste.
11. Revival of tenancy.
12. How lease is affected by statute of frauds.

1. A class of estates has been established with this name possessing essentially a modern character. They are founded on oral or parol leases, and usually require six months' notice for their termination.[1] A tenant who is permitted to remain without such a notice into a second year is regarded as having a lease for another year, and so on. Consequently such a lease continues until either party gives the other the notice required for its termination.

[1] "The length of time required to be observed in giving notice is regulated by statute and generally varies with the length of the periods between the payments of rent. If it be a yearly rental, the English rule, which is followed in some of the states, requires six months' notice; while, in some other states, a shorter time, usually three months is required. If the rental be for a period less than one year, as by the quarter, month, etc., then, as a general rule, the notice must be for as long a time as the periods of payment. If the statute requires notice, but the length of the notice is not stated, it is held that a reasonable notice must be given. And the parties may always, by special agreement, control the length and other provisions of the notice." Tiedeman, Real Property, § 218, p. 186.

2. To establish the tenancy it must appear that there was an entry or letting for an indefinite time, or an agreement to pay rent measured by the year or fractional parts, or an actual payment if none was originally fixed. Though the hiring for a term within the statute of frauds is a tenancy at will, it is converted into a tenancy from year to year by slight evidence of this intention of the parties. If one should merely authorise another to go on land and cut wood at an agreed price, a tenancy from year to year would not be established, and, consequently, the contractor would not be entitled to a notice to quit.

3. When the lease is for one year or other certain term no notice to quit is needful, although, if the tenant holds over, he may be held at the election of the lessor as a tenant for rent at the rate originally fixed.

4. Merely to suffer a tenant to hold over, without any act or assent on the part of the landlord, will not change the relation into a tenancy against the lessor's will, or prevent him from maintaining an action of trespass, or ejectment of the tenant as a wrong-doer.[1]

5. A tenancy from year to year has many of the qualities and incidents of a term for years. The lease may be assigned; the lessor may be liable to the tenant in the same manner as if the longer relationship of a tenancy for years existed between them. Both parties have the same rights with respect to strangers as in the longer relationship. The tenant is liable for rent should the premises burn down.

6. Tenants from year to year are not bound to make

[1] 1 Washburn, § 801, p. 499.

substantial repairs unless they have agreed to make them. Indpendently of contract, it has been said that a tenant from year to year must keep the premises wind- and water-tight and make fair tenantable repairs, put up fences or repair windows and doors that have become broken during his occupancy. But he is not liable for the wear and tear of the premises, nor answerable if they are burned down, nor bound to repair them if they become ruinous by accident, nor to make general repairs.

7. Both parties are equally bound to give notice in order to end the tenancy. Of the form of notice it may be said that, if the lease has been made by three notice by two will not suffice: all must join. The notice may be oral, unless the statute, or an agreement requires the notice to be in writing. It must clearly indicate the time for the tenancy to expire—the end of the year, quarter, month, and the like. A tenant who comes into a house in the middle of a quarter, and pays rent on the regular quarter days, begins his tenancy at the first regular quarter day, and a notice to quit must conform to that time. Should entry into different parts of the premises be made on different days the notice is considered as beginning on the date when entry was made into the principal part of the estate. What this part may be is a question of fact for the jury to decide.

8. In interpreting a notice the courts seek to construe it broadly, in order to make it effective; and unless the party notified has been misled by the time indicated, the notice will be sufficient. If the tenant

states to the lessor's agent a day as the end of the lease, to which the notice conforms, the tenant is bound even though this proves to be a mistake.

The notice must be served on the landlord's own tenant, and not on a subtenant of his lessee. In one case the premises consisted of a shop, and the lessee took a partner, making, however, no new contract with the lessor. The notice was served on the partner during the lessee's absence, and this was sufficient to determine the tenancy. The notice may be made personally or left at the dwelling-house of the tenant with a servant, but not simply on the premises. If left in the latter manner the service will not suffice unless it appears that the tenant actually received it.

By the common law rule, when the tenancy is yearly, notice must be given six months before the expiration of the year. When the period is for a shorter time it is technically a tenancy from year to year, though the notice need not be given except for the quarter, month, or week, during the existence of the tenancy.

9. The tenant's liability for rent continues until the end of the lease, whether he actually occupy the premises or not.

10. By committing voluntary waste he forfeits all right to the notice to quit, for, by so doing, he terminates the estate.

11. A tenancy may be revived, after giving notice, by accepting rent for a longer period. If rent was due at the time of the serving of the notice, and is afterward received, this does not revive the lease, for it is

simply the payment of a just obligation which has already accrued.

12. By the statute of frauds an oral or parol lease can have a legal effect only for a short period. In many states the lease is invalid if exceeding three years from the time of making it. In one state, Florida, an oral lease may be made for two years. In much the larger number a lease for more than a single year is contrary to or "within" the statute of frauds, as the books say, and invalid.

§ 16. By Tenant at Sufferance

1. Who is a tenant by sufferance.
2. How tenancy arises.
3. Cannot deny his landlord's title.
4. Cannot acquire title against landlord.

1. A tenant who has come rightfully into possession of lands by the owner's permission, and continues to occupy them beyond the time for which this was given, is a tenant at sufferance. In the language of the law, he is one who comes in by right and holds over without right. Yet he is not a trespasser.

2. Such a tenancy may arise in various ways; for example, after a tenancy for years has expired, or a tenancy has come to an end by the death of the lessor, or by his selling his land. Another example may be given because it is so common; a mortgagor remains in possession after his land has been sold; in short, anyone who continues in possession without agreement

after the end of a particular estate by which he first came into possession is a tenant at sufferance. His original possession in all cases, therefore, was by virtue of an agreement, for when one remains under any other condition he is not a tenant at all, recognised by the law, but simply an intruder or trespasser who can be treated accordingly. Indeed, in some states, the law declares that a tenant who seeks to remain in possession after the expiration of his lease may be treated by the lessor as a tenant from year to year, or as a trespasser, just as he pleases. The tenant, if the land-owner chooses to dignify him by that name, can exercise no election in the matter. In other states a different rule prevails, and he is regarded as a tenant at sufferance.

3. Of course, he cannot deny his landlord's title. The moment the parties agree to any kind of holding, tenancy at will or otherwise, the former relation ceases. Thus, a landlord, by accepting rent from him, would terminate the tenancy by sufferance.

4. A tenant at sufferance cannot avail himself of his position to acquire a right to the premises by adverse use or possession. He is not entitled to notice to quit before the summary process for his removal, unless the statute requires one to be given. In this country, however, the statutes have been everywhere enacted for giving notice in nearly all cases of tenancy. And this is a safe practice to follow in dealing with such persons.